REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery.

MVSEVM
BRITANNICVM

VOLUME THE FOURTH.

Beginning with the Sittings after *Easter* Term 38 *Geo.* III. 1798,
and ending with the Sittings after *Trinity* Term 39 *Geo.* III. 1799.

BY FRANCIS VESEY, JUN. ESQ.
OF LINCOLN'S INN,
BARRISTER AT LAW.

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M.DCCC.

EX
MVSEVM
BRITANNICVM

ADVERTISEMENT.

THE preceding Volumes of this Work, containing three very large Tables of Cited Caſes, it is judged unneceſſary to incumber it farther in that reſpect to the ſame extent. The Table of Cited Caſes to this Volume is therefore confined to Manuſcript Caſes, and, of thoſe, that are in print, to ſuch as are corrected, explained, or particularly diſcuſſed.

The Table of Statutes referred to is alſo confined to ſuch as are particularly diſcuſſed.

ERRATA.

Vol. II.

Page 388. line 11. *for* "Bailey" *read* "Goulding"
600. — 29.
30. *Eraſe the paſſage* "But, as I take it," *&c. to the full ſtop*
31.
676. — 18. *for* "he" *read* "ſhe"
677. — *for the ſtatement of the decree at the bottom read* "The plaintiffs electing "to take under the will of *Edward Knight*, the bill was diſmiſſed." *Correct the ſtate of the caſe according to* Rutter *v.* Maclean, vol. 4. 531

Vol. III.

94. line 13. *for* "condition" *read* "legacy"
761. *In* The Nabob of the *Carnatic* v. The Eaſt India Company, *the appeal was not heard; the Court of Directors having received an account of the death of the plaintiff; which put an end to the ſuit.*

Vol. IV.

43. line 34. *for* "title" *read* "tittle"
50. — 20. *for* "conſtructing" *read* "conſtruing"
57. — 28. *for* "2000" *read* "20,000"
137. to 146 *incluſive, margin, for* "Wilſon" *the name of the plaintiff, read* "Whiſtler"
198. line the laſt, *for* "it" *read* "is"
228. — 18. *before* "caſe" *inſert* "in"
304. note (*b*) *for* "ante, vol. 2." *read* "2 Veſ."
305. line 36. *for* "profit" *read* "profits"
308. — 19. *for* "or" *read* "of"
322. note (*a*) *at the end add* "3"
360. line 4. *for* "*Cro.*" *read* "*Bro.*"
368. — 4. *for* "Ryle" *read* "Pyle"
389. — 9. *for* "Benjamin" *read* "Thomas"
396. — 21. *for* "effected" *read* "affected" *the name of the caſe is* "Taylor *v.* Fields"
469. — 20. *for* "or" *read* "of"
477. — 19, 20. *for* "mortgage" *read* "morgagee"
527.
528. *Theſe pages are repeated*
551. line 11. *for* "each" *read* "ſuch"
12. *for* "that" *read* "but"
621. note (*a*) *for* "92" *read* "90"
649. line 29. *for* "will" *read* "bill"
656. — 20. *for* "Gregory" *read* "Graham"
686. — 5. *from the bottom, for* "if" *read* "of"
738. — 24. *for* "ſequeſtrations" *read* "ſequeſtrators"
770. — 2. *for* "effected" *read* "affected"
788. — 31. *for* "behalf" *read* "behoof"
794. — 4. in marg. *for* "novem" *read* "nomen"
803. — 11. *for* "her" *read* "the"
815. margin, *for the names* "Kennell *v.* Abbott" *read* "Hartwell *v.* Hartwell"
820. line 18. *for* "point" *read* "print"

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N. B. "*Verſus*" always follows the name of the Plaintiff.

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SITTINGS AFTER

Eaſter Term,

38 Geo. 3. 1798.

In the courſe of the Sittings after *Trinity* Term 1798, upon the death of Mr. Serjeant *Adair*, Mr. GRANT was appointed Chief Juſtice of *Cheſter*. 1798.

Mr. *Cox* ſucceeded Mr. *Grant* as a *Welch* Judge.

GENERAL ORDER.

July 12th.

It is ordered, That from and after this day no writ of *Dedimus poteſtatem*, to be executed in *England*, ſhall iſſue under the Great Seal directed to any perſons, except the Judges, Serjeants at Law, Barriſters of five years ſtanding, or Solicitors or Attorneys of ſome of the Courts in *Weſtminſter*-Hall; the Judges of the Courts of *Seſſion* and *Exchequer*, Advocates, and Clerks of the Signet of five years ſtanding, in *Scotland*.

TYRRELL *v.* TYRRELL.

Rolls.
May 23d and 25th.

The general rule, that a legacy payable in future ſhall not carry intereſt before the time of payment, applies to a legacy to infants payable at twenty-one: the exceptions are the caſe of parent and child, the caſe of a reſidue, and where from other ſpecial circumſtances an intention to give intereſt clearly appears.

JOHN ALLWRIGHT by his will gave the following legacy:

"I give and bequeath the ſum of 300*l.* unto and amongſt
" all and every the children of my couſin *Avery Tyrrell* of the city
" of *London* attorney at law that ſhall be living at the time of my
" deceaſe to be divided amongſt them ſhare and ſhare alike Which
" ſaid ſum of money I direct my executors hereinafter named to
" pay within twelve months after my deceaſe or ſo ſoon after as
" they ſhall reſpectively attain the age of twenty-one years."

Among other legacies the teſtator gave to his friend *Henry Bath* the ſum of 250*l.* upon truſt to place out the ſame upon government or other ſecurity, and the intereſt ariſing therefrom to pay and apply towards the clothing and maintenance of ——— till he ſhould attain the age of twenty-one; and then to pay the ſaid legacy to him.

The teſtator gave all the reſidue of his perſonal eſtate to *Joſeph Tyrrell* and appointed him ſole executor.

The bill was filed on behalf of the infant children of *Avery Tyrrell* to have the ſaid legacy of 300*l.* paid and laid out for the benefit of the plaintiffs, until they ſhould attain the age of twenty-one; and that in the mean time the intereſt ſhould be paid to their father towards their maintenance.

The queſtion was, whether the plaintiffs were entitled to the intereſt before the time of payment.

Mr. Fonblanque for the plaintiffs.—The diviſion is to be made immediately on the death of the teſtator. An appropriation muſt follow as a conſequence of that. He does not poſtpone the payment with a view to the benefit of the eſtate, but only to the condition of the legatees. The laſt caſe upon this ſubject, *Crickett* v. *Dolby*, *ante*, vol. 3. 10, was determined by your *Honor* after much conſideration: but it appears to deſerve ſome conſideration, whether the principle there ſtated, *viz.* that “ intereſt is to be given “ only for default of payment,” is the true principle, upon which the Court has proceeded. That is not the principle applicable to ſome of the caſes; for it is clear, that where a legacy is given payable at a future period, and charged upon a fund producing intereſt or any advantage, the legatee will in reſpect of the produce be entitled to the intervening advantage. The principle is familiar, that where you find, the purpoſe of the teſtator in poſtponing the time of payment or of raiſing the charge is only with reſpect to the party, not the eſtate, it is an exception to the general rule. Here the teſtator has directed payment within twelve months after his death, or ſo ſoon after as the legatees ſhall reſpectively attain twenty-one. Suppoſe, he had ſaid, that if they ſhould not be of that age at that time, in reſpect of their imbecility, not with a view to the benefit of the eſtate, or to increaſe the reſidue, the payment ſhould be deferred until the age of twenty-one. Your Honor obſerved, that in *Acherly* v. *Vernon*, 1 *P. Will.* 783. Lord *Macclesfield* in giving the intereſt founded himſelf upon the ſpecial circumſtances. The ſpecial circumſtance of that caſe was, that the 6000*l.* was ſevered from the reſt of the eſtate; and in this inſtance the direction as to the diviſion amounts to a ſeverance. This is not treated as a general legacy. In *Nicholls* v. *Oſborn*, 2 *P. Will.* 420. the time of payment was deferred merely in reſpect of the infancy of the party to take the bounty; not for the benefit of the eſtate; nor like the caſe of a teſtator deferring the time of payment till twelve months after his death: an arrangement to give the executor time to turn round. Its being a reſidue does not vary the queſtion. Here he has diſtinctly denoted, that his purpoſe was not to benefit the eſtate. In *Crickett* v. *Dolby* the payment is to be in no event till the age of twenty-one or marriage; which perhaps diſtinguiſhes that caſe from this. The principle of that caſe, when accurately conſidered, is not ſufficiently large for the purpoſe of eſtabliſhing a general rule.

Mr. Lloyd and Mr. Cox for the defendant.—All this argument was urged in *Crickett* v. *Dolby*. All the caſes were cited; particularly *Nicholls* v. *Oſborn*, to ſhew, that there was no ſound diſtinction between a reſidue and a particular legacy. With a view to ſettle the point your *Honor* took time to conſider; and went through the whole of it; and no Judge could take more pains. It will be a great public misfortune, if the rule there eſtabliſhed is got rid of by a frivolous diſtinction; and there is no difference in ſubſtance. Its being a veſted intereſt certainly makes no difference; and though your *Honor* ſaid, the point had never been determined, I am clear, there are many ſuch caſes in the *Regiſter's Book* (*a*). The veſting of a legacy payable in future is not upon the intention, but a technical rule of the Eccleſiaſtical Court followed by this Court. Lord *Hardwicke* in *Heath* v. *Perry*, 3 *Atk.* 101. and *Hearl* v. *Greenbank*, 3 *Atk.* 716; 1 *Veſ.* 307. expreſſed the ſame opinion as your *Honor* of *Acherly* v. *Vernon*. *Nicholls* v. *Oſborn*, which is often cited, cannot be applied to a caſe of this kind. There is a ſenſible diſtinction. Intereſt has been ſaid to be given for delay of payment. If the legacy is

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(*a*) The Maſter of the *Rolls* obſerved, that he only meant, that no caſe was to be found, in which the Court had determined the very point as a litigated point.

not

1798. TYRRELL v. TYRRELL. not due till a certain time, the intereſt till that time muſt go to the perſon entitled to the reſidue: but in the caſe of a reſiduary bequeſt, ſubject to be deveſted only upon a contingency, what is to become of it? It is perfectly abſurd to ſay, the teſtator meant to die inteſtate as to the dividends, having given a veſted intereſt in the capital; and in *Butler* v. *Butler*, 3 *Atk.* 58. Lord *Hardwicke* was clearly of opinion, the next of kin could not claim in that caſe. The words directing the diviſion in this caſe have no other effect than to make them tenants in common. There is no appropriation; nor any poſſible diſtinction between this and *Crickett* v. *Dolby*.

Reply.—The defendant relies entirely on *Crickett* v. *Dolby:* but the principle, upon which that caſe profeſſes to proceed, is too narrow to govern other caſes; for the delay of payment is not the only reaſon for giving intereſt. It muſt always be a queſtion of conſtruction, whether the teſtator has indicated, that the acceſſary ſhall follow the principal. The general rule narrows itſelf to this; that where payment is deferred with a view to the benefit of the eſtate, no intereſt ſhall be given: but if the view is only to the condition of the party, that is a ſpecial circumſtance to take it out of the general rule. In this will the event, upon which the payment is ſuſpended, is, if the legatees ſhall be infants at the period of twelve months after the teſtator's death. He did not intend the infancy of the legatees to operate to the benefit of the reſiduary legatee. His bounty is marked out in particular ſhares: but it was prudent to ſuſpend the payment with a view to the benefit of the legatees, not of the fund.

May 25th. *Maſter of the Rolls.*—This caſe was extremely well argued; and it has been attempted with great ingenuity to diſtinguiſh it from the late caſe of *Crickett* v. *Dolby.* The judgment in that caſe was not given upon any opinion of my own with regard to the rule; for I am ready to admit, that, if I had been originally to decide upon legacies payable at a future day, and that day the majority of an infant, I ſhould have thought it more reaſonable to hold in all caſes, that the payment was poſtponed merely on account of the imbecility of the party, and not to exempt the executor from paying intereſt: but upon that occaſion I looked through all the caſes; and I found the very contrary eſtabliſhed; and the very caſes, which have been conſidered as exceptions to the rule, are ſo many proofs of the rule. If the rule was general, that ſuch a legacy was to carry intereſt in all caſes, what occaſion was there for all the argument and diſcuſſion upon the particular circumſtances in *Acherly* v. *Vernon* and *Nicholls* v. *Oſborn*; the latter of which was decided on account of its being a reſidue? Thoſe very caſes prove the general rule. It has never been denied ſince as a general rule, that, wherever a day of payment is mentioned, unleſs it is clearly proved, the teſtator meant intereſt to be paid in the mean time, it ſhall not be paid. The legacy is nothing but a direction to the executor to pay; and he takes all the reſt, paying that. Mr. *Fonblanque* very properly admitted the rule; but ſaid, that, wherever it is clearly pointed out, that the ſuſpenſion of payment aroſe merely from the character and ſituation of the legatee, the rule could not apply. Does this caſe afford any ſuch inference? On the contrary, independent of the clauſe itſelf, which I think would not be ſufficient by any means, there happens to be the very caſe provided for in the ſubſequent part of the will (*a*). The legacy to the plaintiffs is not given to truſtees; which is a very material circumſtance; for, if it was, that might afford an argument, that thoſe truſtees would be entitled at the ſame time as any other legatee; and they could not be meant to put the intereſt in their own pockets. But this is a gift to theſe children, to be paid at the age of twenty-one. What legacy can they demand till that time? When the teſtator wiſhed to put a fund in truſt to maintain an infant legatee, he made an expreſs proviſion for that purpoſe. That would have taken away any inference, that could ariſe. But even if that clauſe was out of the caſe, I am clearly of opinion upon the rule, that has been eſtabliſhed, that, wherever a ſum of money is ordered to be paid at a particular time, unleſs in the caſe of an infant having a right to demand maintenance from the teſtator (*b*), the legatee has a right from that time only. The duty attaches upon the executor, when the teſtator directs the legacy to be paid. No demand could be made upon the executor before that time; and though he may be called upon to ſecure the fund, he has a right to ſay, he ſhall not pay more than if he had not been called upon to ſecure it.

I ſhall never be anxious to raiſe diſtinctions to get out of a rule indirectly. If I ſubmit to a rule, I will take the rule, and con-

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(*a*) This clauſe of the will was not ſtated in the briefs; and the counſel were not apprized of it, before the argument was nearly concluded.

(*b*) See *Mitchell* v. *Bower*, *Ante*, vol. 3. 283.

ſtrue it fairly. It is too late to diſpute this rule, when Lord *Hardwicke* and Lord *Thurlow* make no doubt about it. Infinite miſchief might ariſe by giving way to the wiſh to ſtruggle for an infant; though one muſt think the ſuſpenſion meant only on account of the imbecility: but I never will do it, where I ſee a general rule.

BYRN *v.* GODFREY.

June 22d.

Notwithſtanding declarations of the teſtator to his executor, that he never meant to call for payment of a promiſory note, it was held part of the aſſets; which were inſufficient for the legacies; a charge on the real eſtate failing for want of a proper atteſtation of the will.

JOHN CREE, being poſſeſſed of a conſiderable perſonal eſtate, by his will, dated the 20th of *October* 1795, but which was not executed as is by law required to paſs real eſtates, directed, that all his eſtates real and perſonal ſhould be converted into money, and be placed out upon landed ſecurity; and that the iſſues and profits thereof ſhould be diſpoſed of, *&c.*; and among other bequeſts the teſtator gave to *John Byrn* the ſum of 100*l.* *per annum* for his life in half-yearly payments at *Chriſtmas* and *Midſummer* with remainder to his daughter *Caroline Byrn* for her life after *John Byrn*'s deceaſe.

The teſtator died in *November* 1795. Upon the bill of *David Godfrey* and *James Archdekin*, the acting executors of the teſtator, a decree was made in *Michaelmas* Term 1796 directing the uſual accounts. In *May* 1797 *John Byrn* on behalf of himſelf and his infant daughter filed this bill againſt the executors; praying an account of what was due to the plaintiff *John Byrn* in reſpect of the annuity bequeathed to him, and that the defendants may be decreed to pay what ſhall appear to be due; and that the future payments may be ſecured; that an account may be taken of the perſonal eſtate of the teſtator; and that the defendants may be decreed to deliver up to the plaintiff *John Byrn* the promiſory note, mentioned in the bill, to be cancelled, and be reſtrained from commencing any action upon the ſame.

The promiſory note, as to which the relief was ſought, was given by the plaintiff to the teſtator, dated the 8th of *November* 1793, for 200*l.*; which the teſtator had lent to the plaintiff; and the bill charged, that the teſtator in his life-time acquitted and diſcharged the plaintiff from the payment of the ſaid note; and never received or demanded any intereſt on it; and never demanded or intended to receive the principal; and a few months before his death, he told the plaintiff, who then offered to pay the note, that he ſhould never call either for the principal or intereſt due on it; and that it ſhould be conſidered as ſatisfied; and that he could not then give it up, becauſe it was in *London* at his banker's.

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The bill alſo charged, that the teſtator the day before his death prepared inſtructions for his will at the houſe of the defendant *Archdekin*; and then ſtated to the ſaid defendant an account of his property; and in making memorandums of the amount he mentioned the ſaid note; and informed the ſaid defendant, that the ſaid note was not to be accounted part of his property; as he never meant to demand it; and that the ſaid debt ſhould never appear againſt the plaintiff; or to that effect; and the teſtator frequently upon other occaſions declared in the hearing of the ſaid defendants, who were alſo executors of his former will, and of divers other perſons, that he never meant to demand payment of the ſaid note; and that the ſame ſhould never be enforced againſt the plaintiff, or to that effect.

The plaintiff however having no evidence in ſupport of theſe charges, the cauſe was heard on bill and anſwer.

The defendants by their anſwer ſtated, that they knew nothing of the converſation between the plaintiff and the teſtator, as ſtated by the bill; and that they believed, the aſſets of the teſtator would be by no means ſufficient for the payment of the legacies and annuities given by the will. The defendant *Godfrey* ſtated, that he never had any converſation with the teſtator, nor ever heard him make any declaration concerning the ſaid debt ſo due from the plaintiff.

The defendant *Archdekin* admitted, that the teſtator frequently declared to the defendant, and in his preſence and hearing, that he never meant to call upon the plaintiff for the 200*l.* he had lent him on his note; and the defendant ſtated, that he particularly remembered, that on the day before the death of the teſtator, while he was writing down inſtructions for a new will at the houſe of the defendant, the teſtator declared, that the ſaid *John Byrn* was his particular friend; and as he had a large family, he the ſaid teſtator would not on any account diſtreſs him by calling on him for the money, he had lent him; or to that effect.

By a farther anſwer the defendant *Archdekin* ſtated, that the teſtator was on the day preceding his death at the defendant's houſe; and on being queſtioned by the defendant what he was ſo attentively committing to paper the teſtator anſwered, that he was making out a ſtatement of the amount of his fortune, as a preparatory ſtep towards enabling him to give proper directions to Mr. *Claridge* for a new will; as he had altered his former teſtament; of which this defendant had been alſo appointed one of the executors; that at ſuch time, as aforeſaid, and on ſeveral previous occaſions the teſtator declared, that he never meant to call on the plaintiff for the ſum of 200*l.*, which he owed him on his note of hand; as a very long and moſt intimate friendſhip had ſubſiſted between the plaintiff and the teſtator; and moreover as the plaintiff had a large family, and was in circumſtances proportionably narrow: but the defendant does not remember or believe, that the teſtator did ever inform him, that the ſaid note was not to be accounted part of his property; or that he intended to cancel it; or that the ſaid debt ſhould never appear againſt the plaintiff: yet the defendant from what he had heard the teſtator ſay, as well on the day preceding his death as on other days, (the particulars of which the defendant has hereinbefore ſet forth,) inferred, that the teſtator did not at the time of ſuch converſations mean, that the ſaid note ſhould be conſidered as any part of his property.

Mr. Mansfield and Mr. Romilly for the plaintiff.—Wekett v. *Raby*, 3 *Bro. P. C.* 16. is a ſtronger caſe than this. The defendant admits language in the ſtrongeſt terms expreſſing the ſenſe of the teſtator, that the plaintiff ſhould not be called upon for payment of the note; as a very long and intimate friendſhip had ſubſiſted between them; and the plaintiff had a large family, and was in narrow circumſtances. The defendant *Archdekin* alſo admits, that he underſtood, the teſtator did not mean, that this note ſhould be conſidered as any part of his property. *Richards* v. *Syms*, 2 *Eq. Ca. Ab.* 618. *Barnard. C. C.* 90, and alſo reported in 2 *Atk.* 319 upon a motion for a new trial, is a direct authority. That was a releaſe without conſideration; which probably will be the ground of oppoſition in this inſtance. Lord *Hardwicke* there relies upon the circumſtance, that the mortgagee ſaid, the mortgagor might keep the deeds; which he conſidered as equivalent to delivering them up.

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Lord CHANCELLOR.—The caſe of *Pye* v. *Aſton* before Lord *Kenyon* at the *Rolls* upon Sir *Thomas Pye*'s will was exactly like this. Sir *Thomas Pye* had made an entry in his book, that he had taken a note; that he never intended, it ſhould be made uſe of againſt the debtor, unleſs he himſelf ſhould want it. In that ſituation he died, having diſpoſed of his perſonal property. Lord *Kenyon* ſent it to the Court of *Common Pleas* to ſee, whether we could make a releaſe of it. That failed. An idea was thrown out, that they might prove it in the Eccleſiaſtical Court. I believe, that alſo failed. The difficulty is, what you can make of it unleſs you can make it a releaſe. I do not ſee, how I can conſider it otherwiſe than as part of his aſſets.

Attorney General and Mr. Leach for the defendant.—In the caſe in *Bro. P. C.* the reaſoning goes upon this; that it would be a fraud in the reſiduary legatee to diſappoint the intention of the teſtator. From the expreſs direction to the reſiduary legatee, her promiſe, and the acknowledgment of it, it was a breach of truſt to put the bond in ſuit; and the Court interfered on that ground. This executor is not ſtanding for himſelf. He takes nothing under the will. In the other caſe cited the mortgagor had ſome way or other got back poſſeſſion of the deeds; and he went to return them to the mortgagee: who then deſired him to keep them; which Lord *Hardwicke* thought equal to delivery of the deeds: but the jury did not think the account of the tranſaction founded. It is very dangerous to admit evidence of theſe converſations. This muſt be conſidered as a releaſe, if any thing. There is not the leaſt colour for it as *donatio mortis cauſâ*. According to *Heathcote* v. *Crookſhanks*, 2 *Term Rep. B. R.* 24. a creditor may recover the debt even againſt his own promiſe; and therefore his executor may.

Reply.—There can be no diſtinction between declarations of the teſtator to a reſiduary legatee and to an executor. A creditor ſurely may forgive a ſimple contract debt. This amounts to a releaſe. In *Pye* v. *Aſton* it was not an abſolute releaſe, but in caſe he ſhould not himſelf want it. Lord *Kenyon* thought, evidence ought to have been given, that he was in circumſtances not to want it. In this caſe there is a poſitive declaration of the teſtator, that he did not mean, the debt ſhould be called in.

Lord CHANCELLOR.—This caſe goes a great deal farther than either of the caſes quoted. In the caſe before Lord *Macclesfield* the

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ground, upon which he determined, was very ſtrong; for according to the admiſſion in the anſwer the teſtator, at the time he was giving directions, parol directions, about his funeral, held a converſation with his reſiduary legatee; telling her, *Raby* had been a particular friend to him, and would be to her; that he had kept the bond, becauſe he might want it himſelf as much as *Raby*; but that he did not intend, *Raby* ſhould pay it. There were other circumſtances. Immediately after the death of the teſtator, when upon examining his papers the bond was found, *Raby* deſired, it ſhould be given up to him. The reſiduary legatee ſaid, it ſhould not be put in ſuit. He objected, that it might not always be in her own power; and ſuggeſted, that ſhe might marry; and ſhe promiſed, that in caſe of her marriage ſhe would give it up the night before her marriage. She did not admit all this: but ſhe admitted the converſation with the teſtator; and only qualified it thus; that he did not order her to deliver up the bond: but ſhe admitted the declaration of his intention. She did not deny the converſation after the death of the teſtator; but gave this turn to it; that *Raby* aſked her to give up the bond as a favor; and ſhe ſtated it as an option in her. From all this the Court had a fair ground to conclude, the caſe ſtood exactly according to the repreſentation of the plaintiff; and being ſo, the teſtator talking to a reſiduary legatee, and that being admitted, ſo as that the Court has ſufficient evidence, the reſiduary legatee will not be permitted to benefit herſelf of that, which was not given to her. It is very near an undertaking by her to do ſomething, if the will is not changed (*a*). Therefore the ſilence is aſſent on the part of the reſiduary legate, and an engagement, which in point of conſcience ought not to be broken by her.

Undertaking to do ſomething if the will is not changed, is binding.

The caſe before Lord *Hardwicke* is very ſtrong; and I take it, he conſidered it equivalent to a delivery of the mortgage-deed with an intention, that it ſhould never be uſed. The deeds coming into the poſſeſſion of the mortgagor, he repreſents himſelf as having very honeſtly offered to deliver them to the mortgagee; who ſaid, "No:, keep them: I do not intend to demand the "debt." It is very near a delivery of the deed; and if that had been the fact, there is no doubt, the repreſentatives would not be entitled to call it back to put it in ſuit.

(*a*) *Barrow* v. *Greenough, ante*, vol. 3. 152. Other caſes of the ſame ſort are collected in the note vol. 3. 38, 39.

I am afraid of this caſe; for it really amounts to this: it is ſetting up the parol declarations of the teſtator to defeat the will. If it was the caſe of a reſiduary legatee, there would be much leſs difficulty: but here is a will giving particular legacies; and this 200*l.* is wanted as aſſets. According to the account of the defendant *Archdekin*, which is, I dare ſay, a very fair one, at the time, the teſtator was about to make a will according to the ſtate of his property, which unfortunately he did not execute, he had it in his intention. It is not an actual releaſe at any one given time; ſo that I can ſtate, that the debt was gone by the act of the perſon, to whom it was due; nor is it legacy. If inſtead of making a new will, they had only atteſted the exiſting will, there would have been no deficiency. I wiſh, I could have decided the other way; for it is clear what the intention was: but the great danger of the caſe makes it impoſſible.

Diſmiſs ſo much of the bill, as prays, that the note may be delivered up, without coſts: as to the reſidue of the prayer, proceed under the decree in the former cauſe.

The order of the Houſe of Lords as to the coſts in that caſe before Lord *Macclesfield* is very ſingular. It is the only order of the kind, I ever ſaw. If the principle of Lord *Macclesfield*'s decree is fully adopted, no doubt, his direction as to the coſts is perfectly right.

ATTORNEY GENERAL *v.* MINSHULL.

Rolls. *June* 29th.

Deviſe in 1719 to charitable purpoſes, limiting the ſums: there not being objects ſufficient to exhauſt the whole rents, according to the directions of the will, and the whole being appropriated to the charities ſpecified, the ſurplus was applied to increaſe them, againſt the claim of the heir.

WILLIAM HARDING of *Walton* in the pariſh of *Ayleſbury* and county of *Bucks*, by his will, dated the 5th of *Auguſt* 1719 after giving ſome ſpecific and pecuniary legacies and annuities gave to his executors all the clear reſidue of his perſonal eſtate and a houſe, upon truſt, that his ſaid truſtees ſhould, as ſoon as conveniently might be after his deceaſe, ſell the houſe, and inveſt the money ariſing from ſuch ſale together with the reſidue of his perſonal eſtate, which ſhould remain after payment of his debts, funeral expences and legacies, in purchaſe of lands, to them and their heirs; and ſhould apply the rents and profits towards payment of certain annuities and other charges impoſed on ſaid lands

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Attorney General v. Minshull.

and towards the ſeveral purpoſes after mentioned. The teſtator then gave to his ſaid truſtees certain premiſes, ſubject to the eſtate for life of *Sarah Harding*, to whom he deviſed the ſaid premiſes for life, and all other his meſſuages, lands, tenements and hereditaments, whatſoever, to hold to them and their heirs for ever, upon truſt, that they ſhould in the firſt place pay his debts, funeral expences, and legacies; and then upon truſt, that they ſhould for ever after raiſe out of the profits of the eſtate the ſum of 40*s.* yearly, to be laid out towards buying coats for poor men and women within the precincts and liberty of *Walton* in the ſaid pariſh of *Ayleſbury*; which coats he directed ſhould be diſtributed every year by ſaid truſtees among ſuch poor men and women as ſhould be thought by them the moſt proper objects of charity: and he further declared his will to be, that his ſaid truſtees, and their heirs and ſucceſſors, ſhould for ever after diſtribute and employ towards the putting out poor children apprentices in the manner after mentioned: that is to ſay; that ſaid truſtees or the major part of them, or their heirs or ſucceſſors, ſhould make choice of ſuch boys or girls to be apprentices, as they in their diſcretion ſhould think convenient: provided always, that the boys and girls ſo to be made choice of ſhould be the children of poor perſons ſettled inhabitants within the ſaid pariſh of *Ayleſbury* or *Walton*; and after intreating his ſaid truſtees and their ſucceſſors to uſe their utmoſt diligence, that the children to be placed out by virtue of that truſt ſhould be bound to perſons, who were honeſt, of good morals, able and well ſkilled in their ſeveral trades, and after ſome directions, in what manner the charity ſhould be conducted by them, and at what times they ſhould meet for the purpoſe of placing out ſuch poor children apprentices, and for providing proper maſters and miſtreſſes, and after appointing, that 50*s.* ſhould be deducted out of the yearly income of the eſtates to defray the expence of ſuch meetings, and that 20*s.* ſhould be paid out of the ſaid rents and profits to two of his truſtees, to be from time to time appointed receivers of ſaid rents and profits, he directed, that the reſidue of the whole rents and profits of ſaid premiſes ſhould be employed towards placing out ſaid poor children; and that ſaid truſtees ſhould allow ſuch ſums of money as to them ſhould ſeem convenient, provided the ſum ſo to be allowed in putting out each child apprentice ſhould not exceed 10*l.*

The teſtator died in the ſame year. By the decree made upon the Information in 1772 the Charity was eſtabliſhed, and the truſts thereof directed to be carried into execution; and it was referred to the Maſter to appoint new truſtees.

A bill was filed in 1796, ſtating, that the poor ſettled inhabitants of *Ayleſbury* and *Walton* had found it impracticable to provide proper ſituations for their children with any reputable maſters or miſtreſſes for ſo low a premium as 10*l.* and praying a farther allowance for that purpoſe; there being a ſurplus beyond what the charities declared by the will would require.

The heir at law inſiſted on the proviſo; and claimed the ſurplus of the rents and profits beyond what could be applied according to that proviſo.

Mr. Graham and Mr. Campbell for the Relators.—The whole reſidue is to be applied to putting out the children apprentices; the whole eſtate and the rents and profits being deſtined to the Charity. The teſtator reſtrained the truſtees to 10*l.* only becauſe at that time that was a convenient ſum. He did not foreſee the diminution of the value of money. The convenience and propriety of the fee was what he had in contemplation. In *Attorney General* v. *Johnſon*, *Amb.* 190, and *Attorney General* v. *Tonner* (*ante*, vol. 2. 1;) 4 *Bro. C. C.* 103. the increaſe was applied to the charity; the whole being deſtined for that purpoſe. So in a late caſe of *The Attorney General* v. *Hutton* an eſtate in *Yorkſhire* was appropriated to the purpoſe of giving certain ſalaries to the maſter and uſher of a grammar-ſchool: your Honor directed an inquiry as to the introduction of a maſter of arithmetic; and you had no difficulty as to increaſing their ſtipends. *Attorney General* v. *Earl of Winchelſea*, 3 *Bro. C. C.* 373. is very near this.

Mr. Fonblanque for the heir.—There is nothing ſtrong enough to exclude the heir. The teſtator has ſhewn a charitable purpoſe: but he has limited the means, the truſtees were to apply. In none of the caſes cited is the application of the means ſo reſtrained. A particular purpoſe is pointed out; and negative words are uſed as to the application of more than the ſum ſpecified. To exceed that is directly contravening the teſtator's intention.

Maſter of the Rolls.—The late caſe before me was only the caſe of *Thetford School*, 8 *Co.* 130.

I think, Mr. *Fonblanque* puts it upon the right ground; for the queſtion is, whether by augmenting theſe ſums I ſhould contravene the intention of the teſtator; whether I am to ſuppoſe, his intention was, that the apprentice fee was not to exceed the ſum of 10*l.* at all events. If that was his intention, I cannot go beyond it: but it is manifeſt, his intention was to give the whole profits; thinking at the time, there would be more objects in *Ayleſbury* and *Walton*, and that thoſe ſums of 10*l.* would be ſought for by objects, that would exhauſt the whole. He could not intend, that if there was not a ſufficient number of children in that pariſh to exhauſt the profits at the rate of 10*l.* each as an apprentice fee, the Charity ſhould fail. He thought, there would be a ſufficient number: but he miſtook that. I cannot ſuppoſe, he meant his object to fail, becauſe there were not perſons enough deſirous to avail themſelves of it.

The doctrine of *Cy pres* formerly puſhed to a moſt extravagant length is now much reſtrained.

Formerly the doctrine of *Cy pres* was puſhed to a moſt extravagant length (*a*): but that is now much reſtrained. If the charitable object is incapable of taking place at the time of the teſtator's death, the Court is not to look out, and ſubſtitute another; as they did formerly. Thus in the caſe of *Wheatley Church* (*b*) it was preſſed, that the teſtator had a rage for building churches any where: Lord *Kenyon* ſaid, there was no ſuch object: it was intended only for a particular pariſh; and as it could not take effect there, it could not be any where elſe. The caſe of *Attorney General* v. *Johnſon* goes almoſt the whole length of this. There the tithes were diſpoſed of in given ſums: but as the tithes increaſed, thoſe ſums were increaſed. I have no doubt upon that caſe, and particularly upon *Attorney General* v. *Green*, 2 *Bro. C. C.* 492; where the Court varied the nature of the truſt. The object of the gift was to purchaſe advowſons for *Univerſity College, Oxford:* they had as many advowſons as the Legiſlature permitted them to take: Lord *Thurlow* increaſed thoſe, they already had.

(*a*) See this point very much diſcuſſed in *Attorney General* v. *Boultree*, *ante*, vol. 2. 380. vol. 3. 220. *Attorney General* v. *Whitchurch*, *Attorney General* v. *Andrew*, *Attorney General* v. *Bowyer*, *ante*, vol. 3. 141; 633; 714.

(*b*) *Attorney General* v. *The Biſhop of Oxford*, 1 *Bro. C. C. App.* 21. See the obſervations on that caſe in the caſes referred to in the preceding note: particularly *Attorney General* v. *Andrew*.

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My concluſion therefore is, that this teſtator intended the whole of this proviſion for the Charities, he has pointed out: but he imagined, there would be objects enough to exhauſt it at the rate of 10*l.* for each apprentice fee. Therefore I ſhall increaſe it, till there are objects ſufficient to exhauſt the whole. So as to the other charity, the 40*l.* yearly for cloathing the poor people: Why am I not to increaſe that alſo? I will increaſe it.

Therefore refer it to the Maſter to conſider, what will be a proper augmentation for the apprentice fees and the donation for cloaths; and let the Maſter inquire the value of the eſtate purchaſed and the preſent value; and reſerve farther directions.

MACAULAY *v.* PHILIPS.

Rolls. *July* 2d.

Huſband under a decree to propoſe a ſettlement of ſtock belonging to his wife, transferred to the Accountant-General by order, came to an agreement with her, out of court, and while they lived apart, but not legally ſeparated, to take part and give up the reſt: this agreement does not bind the wife; and the huſband dying, before any ſteps were taken for executing it, the whole ſurvived to the wife. Huſband is entitled to the income of his wife's equitable intereſt, unleſs he has received ſome fortune with her; or has miſbehaved, as by running away with a ward of the Court.

ELIZABETH BROWNE being entitled under the will of General *Philips* to the reſidue of his perſonal eſtate married *Angus Macaulay*; having previouſly by a deed of truſt, executed in *June* 1782, with the aſſent of Mr. *Macaulay* ſettled all her own property, conſiſting of 7500*l.* 4 *per cent.* Annuities to her ſeparate uſe for life; with remainder to the children, ſhe then had; and in caſe they ſhould all die in her life, to herſelf, her executors, and adminiſtrators.

Mr. *Macaulay* in *May* 1789 filed a bill in the names of himſelf and his wife againſt *Collier*, the adminiſtrator with the will annexed of General *Philips*, praying the uſual accounts of the teſtator's perſonal eſtate, debts, &c.; that the reſidue might be aſcertained; and that what ſhould be coming due to the plaintiff *Angus Macaulay* might be paid to him. The defendant by his anſwer admitting, that there was of the teſtator's perſonal eſtate unapplied the ſum of 3000*l.* Bank conſolidated 3 *per cent.* Annuities ſtanding in his name, that ſum was under an order made on the 6th of *May* 1790 transferred to the *Accountant-General*.

By the decree made on the 27th of *July* it was referred to the Maſter to take the accounts; with directions to make a ſeparate report of the debts and legacies; and farther directions were reſerved. The Maſter by his ſeparate report, dated the 23d of

April

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April 1796 ſtated what was due upon an annuity given by the will; and that there were no debts or other legacies remaining unpaid. By an order made the 19th of *July* 1796 upon the petition of the plaintiff *Angus Macaulay* it was ordered, that the report ſhould be confirmed; and that the Maſter ſhould tax the coſts, and make a ſeparate report thereof; and that the ſame, when taxed, ſhould be raiſed and paid by ſale of part of the Bank Annuities; and that 1000*l.* Bank Annnuities, part of the reſidue, ſhould be ſet apart to anſwer the annuity; and that *Angus Macaulay* ſhould lay propoſals before the Maſter for a ſettlement of the Bank Annuities and ſuch other parts of the reſidue of the teſtator's perſonal eſtate as might be received; and it being alledged, that the plaintiffs lived ſeparate, it was ordered, that the Maſter ſhould ſtate all material circumſtances relating thereto.

Rolls,
July 2d.

Huſband under a decree to propoſe a ſettlement of Stock belonging to his wife, ſtated to be Accountant-General, by order, came to an agreement with her, out of court, and while they lived apart, but not legally ſeparated, to take part and give up the reſt: this agreement does not bind the wife; and the huſband dying before any [illegible]

Soon afterwards the defendant *Collier* died. Before any farther proceedings in the cauſe a treaty took place between Mr. *Macaulay* and his wife for the purpoſe of compromiſing the claims of the former upon the perſonal eſtate of General *Philips*; and a correſpondence paſſed between their reſpective ſolicitors on the ſubject; in the courſe of which it was by letter, dated the 3d of *May* 1797, propoſed on the part of Mrs. *Macaulay*, that 1100*l.*, part of the ſaid Bank Annuities, ſhould be transferred to Mr. *Macaulay* for an abſolute relinquiſhment of his claims on his wife's property and a total ſeparation of their intereſts. That propoſal was rejected by Mr. *Macaulay*; who propoſed, that one-fourth of the produce of General *Philips*'s will ſhould be ſettled on *Emily Philips*, Mrs. *Macaulay*'s youngeſt daughter: that another fourth ſhould be transferred to him; the remaining half to belong to Mrs. *Macaulay*. This propoſal was alſo rejected on account of the ſettlement required of one-fourth on Miſs *Philips*. That was afterwards waived by Mr. *Macaulay*. By a letter from Mrs. *Macaulay*'s ſolicitor, dated the 13th of *July* 1797, it was propoſed, that 1400*l.* of the ſaid annuities ſhould be transferred to Mr. *Macaulay*; and that the coſts of the application to the Court and of the deed of ſeparation ſhould be taken out of the fund. Mr. *Macaulay* objected to ſome expreſſions in this letter; and ſaying, that if theſe propoſals ſhould come from Mrs. *Macaulay* herſelf in a leſs objectionable ſhape, he would give his final determination, ſhe repeated the offer by a letter, dated the 18th of *July*; which was agreed to on the 21ſt; when Mrs. *Macaulay*'s ſolicitor undertook to prepare the articles of ſeparation; and Mr. *Macaulay*'s ſolicitor was to prepare the petition for transferring the ſtock. It was found neceſſary however previouſly to revive the ſuit againſt the adminiſtrator of *Collier*. A bill of revivor was filed againſt him on the 8th of *Auguſt*, and the cauſe was revived accordingly: but before the anſwer and before any farther proceeding Mr. *Macaulay* on the 3d of *September* died without leaving any iſſue by his wife. By his will, dated the 29th of *Auguſt* 1797, he diſpoſed of all ſums of money belonging to him, or which he was or could be entitled to either in right of his wife or otherwiſe, which have ariſen or may ariſe from the eſtate of General *Philips*, and all his eſtate and intereſt therein, and all other his perſonal eſtate.

Mrs. *Macaulay* filed a bill of revivor and ſupplement on the 3d of *January* 1798 in her own name againſt the adminiſtrator of *Collier*, the adminiſtrator *de bonis non* of General *Philips*, and the executor of Mr. *Macaulay*; praying, that ſhe may be declared entitled for her own uſe to all the ſaid Bank Annuities, (ſubject only as to 1000*l.*, part thereof, to the annuity given by the will of General *Philips*,) and to all other parts of the reſidue of the perſonal eſtate of the ſaid teſtator.

The executor of Mr. *Macaulay* claimed under the agreement.

The caſes cited were *Bond* v. *Simmons*, 3 *Atk.* 21. *Packer* v. *Wyndham*, *Pr. Ch.* 412. *Pybus* v. *Smith* (*ante*, vol. 1. 189). *Fort* v. *Fort*, *For.* 171. *Heygate* v. *Anneſley*, 3 *Bro. C. C.* 362. *Milner* v. *Colmer*, 2 *P. Will.* 638. *Oglander* v. *Baſton*, 1 *Vern.* 396.

Maſter of the Rolls.—The queſtion in this cauſe is, whether the tranſactions, that took place between Mr. and Mrs. *Macaulay*, give his repreſentatives in Equity a right to conſider the agreement as binding, and veſting in him the 1400*l.*, part of the Bank Annuities in queſtion? Firſt it is inſiſted, that from the nature of the property he acquired the abſolute intereſt in it; for, whatever might be the caſe, while the fund was in the hands of the repreſentatives of the teſtator *Philips* or of a truſtee, being paid into court it became abſolutely the property of the huſband; and a *dictum* for that is to be found in one caſe, that was cited: but I ſhould not have agreed to that; though it had not been, as it has been, contradicted; and it would be moſt extraordinary, if the

Court, where it declares the property to be the property of the huſband and wife only in her right, in order to give her a right to a ſettlement out of it, ſhould take it from the truſtee in order to give it abſolutely to the huſband; that the Equity ſhould be gone, and the huſband have a greater intereſt in it, when in court, than while it was in the hands of the truſtee. It is not neceſſary to argue much, that that could not have been the doctrine of the Court; and in *Bond* v. *Simmons* Lord *Hardwicke* ſays, the payment into court makes no alteration in the right and property of the parties. Therefore this is property belonging to the huſband, or rather to the huſband and wife, to which he is entitled only in right of his wife.

The queſtion then is, whether upon ſuch property any action of the huſband and wife not ſanctioned by the Court deveſts her either of the contingent intereſt, if ſhe ſhould ſurvive him without a ſettlement, or of the Equity to have a ſettlement made upon her either with her own conſent given in court, or with the approbation of the Court? It is clear, no agreement, except with the intervention and act of the truſtee, is of any avail, or can be attended to in any degree: if it were, there could be no neceſſity for the examination of the wife; and it would be putting her in the ſame ſituation, that ſhe is in as to her legal intereſts; of which the huſband may clearly compel payment to him at law by uſing her name; and the Court of Law will not interfere againſt his right. In Equity it is directly the reverſe. He may file a bill in her name: but no intereſt of her's will be bound but by her conſent, not taken by the negotiation of friends, but by the Court itſelf. Even if the truſtee after a bill filed, and particularly after a decree for a propoſal, was to pay, the Court would hold it a payment by wrong, and would ſet it aſide. In this caſe there was a decree for a propoſal for a proper ſettlement. It was competent to the Maſter to approve or diſapprove of the propoſal, if it had been laid before him. Suppoſe, he had reported it to me: is it the habit of this Court to take the conſent of a *feme covert* ſignified by the negotiation of friends? Even after the Maſter has approved of the propoſal, if the Court does not approve of it, they examine the wife herſelf, and only by the means of a ſole and ſeparate examination. Therefore it is clear, all, that paſſed out of Court, was not binding upon her.

Difference between legal and equitable intereſts of the wife as to the right of the huſband.

Then the next queſtion is, whether, the huſband having died, there is any doubt, that the equitable intereſt to which the huſband and wife were entitled in her right will ſurvive to the ſurvivor of the huſband and wife? If ſhe had died, notwithſtanding his propoſal he would have been entitled. But I do not mean to determine, what the caſe would have been, if the propoſal had been approved by the Court, and a ſettlement ordered to be made. Perhaps then the Court would have conſidered it as actually made. I am far from determining, that in that caſe theſettlement would be entirely at an end: on the contrary I think, it would be binding; and the accident would make no difference. Therefore the ground of my determination is not merely, that the death happened, before the ſettlement was made, and conſequently the property ſurvived to the wife, but that in this caſe there was no agreement binding upon the intereſt of the wife.

If a ſettlement of the wife's equitable intereſt had been approved and ordered by the Court, it is binding notwithſtanding the death of either party, before it is carried into effect.

Many caſes upon this point have been before me, which have put me under the neceſſity of conſidering very much the right of the wife; and I am clearly of opinion, the doubt reſpecting the aſſignment of the huſband for valuable conſideration of the wife's equitable intereſt was not well founded (*a*), with the ſingle exception perhaps of a truſt of a term for years of land; upon which perhaps there may be ſome doubt: but ſubject to that, I am clearly of opinion, an aſſignment for valuable conſideration will not bar the Equity of the wife; and it would be ſtrange, if it did ſince the determinations in the Courts of Law with regard to an action brought againſt executors by the huſband for a legacy due to his wife. It is determined, that the action does not lie; and the reaſon given is, that it would totally defeat the wife's Equity. It would be whimſical then, that the aſſignment by the huſband for valuable conſideration ſhould put that aſſignee in Equity in a better ſituation than the huſband himſelf is in at Law. The guard of this Court upon the wife's intereſt would be very ſingular, if the huſband not being entitled at Law might aſſign it for valuable conſideration to another perſon, who would be entitled in Equity. I am clearly of opinion, it was only a doubt; and it never was decided, that the huſband could by ſuch aſſignment or any other means deprive her of her Equity.

Aſſignment for valuable conſideration of the wife's equitable intereſt by the huſband does not bar her Equity.

Q. As to a truſt of a term for years of land?

Action by the huſband for a legacy due to his wife does not lie.

It is ſaid in this caſe, that from her living apart from her huſband ſhe was to be conſidered a *feme ſole:* but it would be extraordinary,

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(a) See *Like* v. *Bereſford*, *ante*, vol. 3. 506.

traordinary, that he could by permitting her to live in another houſe entitle himſelf to make a bargain with her, which otherwiſe could not be made. There was no agreement for living ſeparate; and it can be only from the time that ſhe is made a feme ſole that ſhe can begin to act upon it. This is property, to which he was entitled in her right; and without the ſanction of the Court ſhe could make no agreement. Therefore it veſted in her as the ſurvivor.

With regard to the other part of the caſe I think with the Lord Chancellor and the Maſter of the Rolls in *Bond* v. *Simmons*, that, unleſs he received ſome fortune with her, or miſbehaved himſelf, as Mr. *Beresford* did by running away with a ward of the Court (*a*), the intereſt of her fortune ſhould be received by him; and one would not in ſuch a caſe as this deprive him of that benefit.

Therefore declare, that the reſidue of the perſonal eſtate of the teſtator did by the death of *Angus Macaulay* without a ſettlement become veſted in the plaintiff, his wife. Refer it to the Maſter to inquire, how long they cohabited; whether he during ſuch cohabitation received any and what part of her property; and whether he did during cohabitation maintain her or her iſſue; (for ſhe had iſſue by a former huſband, whom he was not bound to maintain;) and let the Maſter ſtate the circumſtances of their reſpective incomes and of the family; and reſerve farther directions.

I deſire to be underſtood, that I do not mean to decide, that if a ſettlement had been approved by the Court, and ordered, and then the huſband had died, it ſhould not have been binding. On the contrary my opinion is, that if a propoſal had been approved, and a ſettlement ordered, and one of them had died, that would have made no difference; for I would not let people ſpeculate upon thoſe accidents.

(*a*) See *Like* v. *Beresford*, *ante*, vol. 3. 506.

1798.

WHITE *v.* EVANS.

Rolls.
July 5th.

One executor being by a legacy for his care clearly a truſtee of the reſidue for the next of kin, the other muſt be a truſtee alſo.

JAMES WHITE by his will declaring, that he choſe for his executors Mr. *Richard Evans* and Mr. *Richard Buſhby*, gave to his wife all the money belonging to him in the 5 *per cent.* Bank Stock and all the ſtock in trade and all the houſehold goods and the leaſe of the houſe, if any remained at his death. He then gave annuities of 5*l.* a-year to two perſons for their lives reſpectively, and a ſimilar annuity to a married woman, if ſhe ſhould be left a widow, and ſhould really want it. The teſtator then proceeded thus:

Charitable legacy ſecured by mortgage is void by the *Mortmain* Act.

"And it is my will, that 3*l.* a-year ſhall be paid to Mr. "*Richard Buſhby* one of my executors during his life for his care "in ſeeing my will duly executed All theſe legacies to be paid "by Mr. *Richard Evans* out of the intereſt of the 3 *per cent.* "Conſolidated Bank Annuities to be received by him or whom he "ſhall appoint to pay the legacies as long as they that is to receive it live out of the intereſt of the aforeſaid ſtock the principal "or capital not by any diminiſhed or removed, and the remainder of the intereſt in that ſtock except what is required to pay "the legacies to be the property of Mr. *Richard Evans* during his "life only I deſire that he will be charitable with a good part of it "and relieve the careful and induſtrious poor not to give any to the "ſlothful and extravagant poor:" then, after ſome directions for a charitable legacy, "And at the death of Mr. *Richard Evans* or "his ſiſters or Mr. *Richard Buſhby* each of their legacies at their "death to be ſole property of the *Saint Alphage* Society."

The teſtator died; leaving his wife ſurviving, but no iſſue. The bill was filed by the widow for an account of the perſonal eſtate; and to have a moiety of the reſidue paid to her; and to have it declared, that a charitable legacy ſecured on mortgage was void by the *Statute of Mortmain*; and that one moiety thereof might be paid to the plaintiff.

See 1 Bro. Cha. Rep. 271. 2 Ve 44.

The Maſter by his report ſtated, that he had cauſed advertiſements to be publiſhed for the next of kin; and that *George White*, the firſt couſin of the teſtator, (being the only ſurviving child of *Edward White*, the teſtator's uncle,) and *Ann White*, the widow of the

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the teſtator were his only next of kin living at his death; no other perſon having claimed before him.

Upon farther directions the queſtion was, whether the executors were truſtees of the reſidue for the next of kin, or could claim it beneficially?

Mr. C. Smith for the plaintiff.—Where it appears, either by expreſs declaration or plain inference, that the executors are not intended to take the reſidue beneficially, they are truſtees: *Bennet* v. *Batchelor* (*ante*, vol. 1. 63). A legacy to an executor is only one mode, by which an intention that he ſhall not take the reſidue is ſhewn (*a*).

Mr. Holliſt for the defendant Evans contended, that there was nothing in this will to make him a truſtee as to the reſidue.

Where it appears by expreſs declaration or plain inference, that executors are not intended to take the reſidue beneficially, they are truſtees. A legacy is only one mode of ſhewing it; and if expreſſed to be for care and trouble, parol evidence cannot be admitted.

Quære as to this which seems to have been said quite extrajudicially.

Maſter of the Rolls.—I agree to the rule, as laid down by the counſel for the plaintiff. Is there any caſe, where one executor is clearly a truſtee, and the other is not? In this caſe one is clearly a truſtee. The Court will not admit parol evidence, where a legacy is given to an executor for his care and trouble. They have run much againſt the executors; and have even laid hold of the circumſtance of a legacy; which is not the true criterion of the intention to make the executor a truſtee (*b*).

I cannot poſſibly declare, that one executor ſhall be excluded, and the other ſhall take; therefore declare, that the teſtator died inteſtate as to the reſidue; and that the charitable legacy ſecured by the mortgage is void by the *Statute of Mortmain* (*c*); and becomes part of the reſidue; and that the reſidue is diviſible between the widow and the next of kin in moieties.

The ground of my deciſion is, that one of the executors has a legacy for his care and pains.

(*a*) *Starkey* v. *Brooks*, 1 *P. Will.* 390. *Mordaunt* v. *Huſſey*, poſt.

(*b*) See *Nourſe* v. *Finch*, *ante*, vol. 1. 344. vol. 2. 78. 4 *Bro. C. C.* 239. *Clennel* v. *Lewthwaite*, *Thornton* v. *Tracy*, *ante*, vol. 2. 465; 644. *Holford* v. *Wood*, poſt. 7 and Mr. *Cox's* note, 1 *P. Will.* 550.

(*c*) See *Pickering* v. *Ld. Stamford*, *ante*, vol. 2. 272; 581. vol. 3. 332; 492. *Attorney General* v. *Meyrick*, 2 *Veſ.* 44.

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July 5th.

MOORE *v.* EDWARDS.

Bill for ſpecific performance of a parol agreement to grant a leaſe for twenty years: Plea of the Statute of Frauds; and anſwer denying, that facts alledged as a part-performance were done in part-performance: the plea was ſaved to the hearing with liberty to except; the Lord Chancellor inclining to the opinion, that, though the agreement is admitted, the Statute may be uſed as a defence to the ſuit.

The bill prayed a ſpecific performance of an agreement made in 1786 to grant a leaſe of a farm for twenty years; alledging, that in purſuance of the agreement the plaintiff took poſſeſſion, and has continued, and ſtill is, in poſſeſſion; that he expended large ſums in rebuilding, repairing, and improving, the premiſes, as he had agreed to do; and he conveyed materials, as he had agreed to do, at great expence and trouble; that the plaintiff and defendant gave inſtructions for preparing the leaſe; and the defendant blamed the negligence of the attorney.

As to ſo much of the bill as ſeeks any diſcovery concerning the agreement the defendant pleaded the *Statute of Frauds*; and that neither he nor any perſon by him authoriſed did make or ſign any contract or agreement memorandum or note in writing for granting the premiſes in the bill or concerning the ſame for the benefit of plaintiff: and by anſwer ſaid, that the plaintiff entered as tenant from year to year; that he did carry ſome materials; but deſerved no more for trouble and expence than 14*l.* 5*s.* and his trouble was no more than tenants from year to year incur, when repairing at the expence of their landlords. He denied, that the carriage of the materials and the trouble thereby were in performance of the agreement in the bill; that in purſuance of the agreement the plaintiff took poſſeſſion, or laid out money in rebuilding or repairing; and that the defendant blamed the neglect of the attorney.

Upon the argument of the Plea the Lord *Chancellor* ſaid, the anſwer was argumentative: and ordered the Plea to ſtand for an anſwer, with liberty to except; and the benefit to be ſaved to the hearing.

Mr. Benyon for the defendant moved, that the words "with "liberty to except" ſhould be ſtruck out of the order, or that the following words ſhould be added "except as to ſuch part of the "ſaid Plea, which inſiſts upon the Statute of Frauds and Perjuries "in bar to the diſcovery of the agreement therein mentioned."

Lord Chancellor.—The order is properly drawn up. Inſiſt upon the *Statute of Frauds* as a defence againſt performing the

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agreement. Your admitting the agreement does not prevent you from inſiſting upon the *Statute.* Saving the benefit of the Plea to the hearing gives you a right to inſiſt upon the *Statute of Frauds* as a defence to the ſuit: but it does not exempt you from the diſcovery. If the agreement is proved by diſtinct evidence, ſtill you are entitled to the benefit of the *Statute.*

For the defendant.—It has been conſidered as ſettled by many caſes, that, if the agreement is admitted, the *Statute* cannot be inſiſted on; as there is no danger of perjury.

Lord Chancellor.—That is matter of argument. I know, it has been ſaid in ſeveral caſes. I do not take it to have been decided. I take it, that poſition has often been controverted. There is a caſe in *Atkyns*, that miſleads people; where Lord *Hardwicke* is ſtated to have over-ruled the defence upon the *Statute* merely on the ground, that the agreement was admitted. I had occaſion to look into that; and it is completely mis-ſtatement. It appears by Lord *Hardwicke*'s own notes, that it was upon the agreement having been in fact executed that he determined that caſe (*a*).

(*a*) The principal caſes upon this point are referred to in the note, *ante*, vol. 3. 39, 40.

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Bill by deviſee in remainder to him and his heirs male of a leaſe for lives againſt tenant for life, alſo entitled in reverſion to him and his heirs, to compel him to procure a renewal, one life having dropped: the conſtruction of the will being, that the leaſe ſhould be kept full, and that 500*l.* and no more ſhould be charged thereon for that purpoſe upon the dropping of each life, decreed, that if the plaintiff choſe to pay the exceſs, the leaſe ſhould be renewed; in truſt to ſecure the 500*l.* and ſubject thereto, for the defendant for life; after his deceaſe to raiſe the farther ſum advanced by the plaintiff for renewal and the expence of the ſuit, with compound intereſt at 4 *per cent.* during the life of defendant; and ſubject thereto for plaintiff in tail male; remainder to defendant in fee: the defendant was not allowed to charge the eſtate with 500*l.* towards a fine paid by him upon a former renewal without conſent of the remainder-man.

Charles White being ſeiſed of an eſtate in the pariſh of *Wilſdon* under a leaſe granted by the Prebendary of *Mapeſbury* to him, his heirs and aſſigns, for the lives of himſelf, *Samuel Grubb*, and *John Ward*, and the life of the ſurvivor, by his will, dated the 1ſt of *December* 1752, and duly executed to paſs real eſtates, gave to *Henry Hyatt* all his meſſuages, lands, tenements, and hereditaments, whatſoever in the ſaid pariſh, for his life; after his deceaſe, to his (the teſtator's) brother *William White* for life; after his deceaſe to *William*, the ſon of the ſaid *William White*; with ſucceſſive eſtates for life to *Samuel*, *Charles*, and *John*, the 2d, 3d, and

4th, ſons of *William White* the elder, and to the teſtator's brother Dr. *Thomas White*; and afterwards to *Charles White*, ſon of the ſaid *Thomas White*, and to his heirs male; and for want of ſuch iſſue, to the teſtator's right heirs for ever. He directed, that his houſe and garden called *Mapes* (being part of the ſaid premiſes) ſhould be kept in good repair; and, if ſaid *Henry Hyatt* ſhould think fit, that his goods and houſehold furniture ſhould be preſerved and enjoyed with the houſe; and he ordered, that the church leaſe of his eſtate ſhould be renewed, and the fine paid out of his perſonal eſtate, as ſoon as poſſible after his deceaſe in the name and for the life of Mr. *Hyatt*, or any other life, he ſhould think fit; and that in caſe any life or lives ſhould be nominated in ſuch leaſe or any ſubſequent leaſe or leaſes to be granted or renewed during the life of Mr. *Hyatt* or during the life or lives of the teſtator's brothers *William* and *Thomas* or their ſons after Mr. *Hyatt*'s deceaſe ſhould happen to die then and in ſuch caſe in order to keep the leaſe full during their reſpective lives and to enable them to pay the fine and fines of ſuch renewals the teſtator thereby gave and granted, willed and transferred, unto Mr. *Hyatt* during his life and to the teſtator's brothers *William* and *Thomas* and their ſons during their reſpective lives as they ſhould come into actual poſſeſſion of the eſtate full power and authority from time to time as occaſion ſhould require to renew the leaſe to mortgage the ſame and the eſtate thereby deviſed or any part thereof for any number of years to any perſon or perſons for any ſum not exceeding 500*l.* for renewing the ſaid leaſe as aforeſaid; and he gave to Mr. *Hyatt* and to his ſaid brothers *William* and *Thomas* and their ſons, as they ſhould come into poſſeſſion of the eſtate, full power and authority to grant any leaſe or leaſes of his eſtate or any part thereof to any perſon or perſons for any number of years not exceeding twenty-one, ſo as ſuch leaſe or leaſes ſhould be made at the beſt rent, that could be got without any fine of income and to be made payable after his, her, or their, death to ſuch perſon or perſons as ſhould be entitled to the reverſion or inheritance thereof.

The teſtator died in *July* 1754. Upon his death *Hyatt* entered; and in *October* 1754 he ſurrendered the leaſe; and took a new leaſe to him, his heirs and aſſigns, for the lives of himſelf and the two remaining *ceſtuys que vie*, who ſurvived the teſtator; paying for ſuch renewal out of the teſtator's perſonal eſtate a fine of 250*l.*

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William White, the teſtator's brother, died in 1762. *John Ward* one of the *ceſtuys que vie*, died in the life of *Hyatt*: but nothing was done upon his death. In 1774 *Hyatt* died; at which time *Grubb*, the only ſurviving *ceſtuy que vie* was of the age of eighty-four. Upon the death of *Hyatt* the teſtator's nephew *William White* entered; and in *November* 1774 without any communication with the remainder-men he ſurrendered the leaſe; and took a new leaſe to him, his heirs and aſſigns, for the lives of himſelf and of *Samuel* and *John White*, his brothers, and of the ſurvivor of them. *William White* paid 500*l.* as a fine upon this renewal; and, having borrowed that ſum from *Thomas Hodgſon*, he in 1775 in purſuance of the power contained in the will mortgaged the ſaid leaſehold eſtate to *Hodgſon* for that ſum.

Charles White died in 1776. *Samuel White* died in *November* 1783. In *April* 1786 *William White* without communication with the remainder-men ſurrendered the leaſe; and took a new leaſe to him, his heirs and aſſigns, for the lives of himſelf, his brother *John White*, and *Richard Hopkins*, and of the ſurvivor of them. Upon this renewal he paid a fine of 1170*l.* no part of which was raiſed under the power contained in the will. By deed-poll indorſed upon the renewed leaſe *William White* executed a new mortgage of the ſaid leaſehold eſtate to *Hodgſon* for ninety-nine years, if the three *ceſtuys que vie* or either of them ſhould ſo long live, for ſecuring the 500*l.* borrowed upon the former renewal.

John White died in 1794; and the teſtator's brother Dr. *Thomas White* died ſeveral years ago. The bill was filed by his ſon *Charles White* againſt *William White*, the tenant in poſſeſſion; who was alſo entitled, as heir at law of the teſtator, to the reverſion, ſubject to the remainder to the plaintiff and his heirs male, and againſt *Hodgſon*, the mortgagee, and the Biſhop of *Glouceſter*, Prebendary of *Mapeſbury*; praying, that the defendant *White* may be decreed to procure another new leaſe for the lives of himſelf and two other proper perſons; and that *Hodgſon* may do any neceſſary act to procure ſuch renewal; and that the defendant *White* may pay the neceſſary fine; and in caſe both the perſons to be named with the ſaid defendant ſhall die in his life, that he may from time to time procure additional lives or an additional life to be added, in order that there may be always during the life of the ſaid defendant three lives in the leaſe: the plaintiff, in caſe it ſhall appear, that he ought to pay any part of the ſaid fine or fines to be paid for ſuch renewal or renewals, offering to pay the ſame.

It appeared by the anſwer, that the eſtate was of the yearly value of 600*l.*

Mr. Grant and Mr. W. Agar for the plaintiff.—In general it is true, that tenant for lives, being himſelf one of the lives, neednot renew, or be at any expence: but that is only, if the teſtator has not given any direction about it. If he has given any direction, that muſt be implicitly followed; and ſecondly, if the teſtator has pointed out any particular fund for renewal, the expence muſt fall upon that: if not, the expence of renewal muſt come out of the rents and profits of the eſtate itſelf. There is a clear intention in this will, that the leaſe ſhall be kept full. The tenant has no option to let any life remain vacant. The injunction upon each tenant is poſitive. The perſonal eſtate of the teſtator is applicable only for the firſt renewal. Another fund is provided under the power to mortgage: but that can only extend to one ſum of 500*l.* The teſtator had no conception, that 500*l.* would be required upon every renewal. It may be inferred, that he thought, that ſum would be ſufficient to aſſiſt the tenants for life for all the renewals, till ſome perſon having an eſtate of inheritance ſhould come into poſſeſſion. The expreſſion "as aforeſaid" refers to the words "from time to time"; and gives countenance to that inference. The fine upon the firſt renewal, when *Hyatt*'s life was put in, was but 250*l.* Upon the next renewal it was increaſed to 500*l.* becauſe the defendant choſe to have three new lives. Now that ſum would not be nearly ſufficient.

If the teſtator had been totally ſilent, the Court muſt have applied the ordinary rule. The old rule was to put one-third upon the tenant for life: *Verney* v. *Verney*, 1 *Veſ.* 428; *Amb.* 88. *Lock* v. *Lock*, 2 *Vern.* 666. and *Graham* v. *Ld. Londonderry*, cited in *Stone* v. *Theed*, 2 *Bro. C. C.* 246. alſo prove, that the Court will without any direction compel the tenant for life to renew, and to contribute to the expence; and *Graham* v. *Ld. Londonderry* was the caſe of a jointreſs; who was herſelf one of the lives in the leaſe (*a*).

31.

(*a*) The Court expreſſed a doubt, whether a tenant for life, who is one of the lives in the leaſe, can be compelled to contribute to the renewal; though he certainly may, to ſurrender the leaſe for that purpoſe.

See 2. Bro. Cha. Cas. 659.

The *dicta*, that a tenant for life, whoſe life is in the leaſe, ſhall not be compelled to contribute to a renewal, cannot apply, when by the intention of the teſtator the eſtate is to be continued, or from it's nature that is to be preſumed; as upon a marriage ſettlement. The defendant's life being in the leaſe can make no difference; for that is by his own act, not by the teſtator. The old rule impoſing one-third of the expence upon the tenant for life has certainly been denied. The rule adopted in *Nightingale* v. *Lawſon*, 1 *Bro. C. C.* 440. has been applied only to leaſes for years; and where, the tenant for life was dead; and therefore it was eaſy to aſcertain what portion of the term he had enjoyed. It has never been applied to leaſes for lives. There is no caſe, in which it has been ſettled by anticipation, upon what terms the renewal ſhall be made, and in what proportion the contribution ſhall be, proſpectively, where the benefit is uncertain. The rents of this eſtate are amply ſufficient to bear the expence. It is no objection, that it is more for the plaintiff's benefit, if the teſtator has ſaid, the tenant muſt renew, and has pointed out no other fund than the rents and profits.

If the old rule is to give way, and the whole expence is to be thrown upon the inheritance, the tenant for life muſt at leaſt keep down the intereſt of that charge. That ſeems to be conſiſtent with your Honor's opinion in *Buckbridge* v. *Ingram* (*ante*, vol. 2. 266). In this caſe beſides the poſitive direction of the teſtator to renew, there is a ground, upon which it is impoſſible, that the defendant can be altogether exempted; for he has himſelf, as heir of the teſtator, a reverſionary intereſt, ſubject only to the chance of the plaintiff's ſurviving him and leaving iſſue. If the plaintiff dies in his life without iſſue, the whole benefit may be his. It is not likely, that he will waive that right (*a*); and the plaintiff cannot bar it (*b*). In *Low* v. *Burron*, 3 *P. Will.* 262. it was held, that the remainder could not be barred. In *The Duke of Grafton* v. *Hanmer*, in a note to that caſe, the *Ducheſs of Grafton*, the tenant for life, joined in a fine; and till that was done, the Court conceived, the remainders could not be barred; and though according to *Waſtneys* v. *Chappell*, 1 *Bro. P. C.* 457. and the other caſes in Mr. *Cox*'s note 3 *P. Will.* 265. any alienation by the (*quaſi*) tenant

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(*a*) An arrangement of that ſort was ſuggeſted by the Court: but the defendant's ſolicitor ſaid, he had no authority to conſent.

(*b*) The Court ſeemed inclined to think, it might be barred by any conveyance.

in tail will be ſufficient to bar the remainder, yet it has never been held, that his act, where he is not in poſſeſſion, will do without the concurrence of the tenant for life; and ſuch a conſtruction would create an intereſt in this ſpecies of eſtate much greater than the analogy to an eſtate-tail, which the Courts have always wiſhed to preſerve, would admit. It appears in *The Duke of Grafton* v. *Hanmer*, that there were truſtees: for the aſſignment was to new truſtees. This plaintiff in truth has but a contingent intereſt.

Mr. Graham and Mr. Fonblanque for the defendant.—The general rule is clear, that a perſon having a limited intereſt for his own life in this ſort of eſtate cannot be compelled to contribute. *Verney* v. *Verney* recognizes that principle; for the deciſion was in reſpect of the circumſtance, that the tenant for life had not ſuch a limited intereſt. There is but one cited caſe, *Graham* v. *Ld. Londonderry*, to the contrary; which does not appear to be anywhere reported; and which I do not recollect to have been cited upon that occaſion; and Lord *Thurlow* in his judgment in *Stone* v. *Theed*, 2 *Bro. C. C.* 248. wholly puts by ſuch an authority. In 3 *Atk.* 393. there is a caſe between the ſame parties upon another point. That was in 1746; and it cannot be ſuppoſed, that Lord *Hardwicke* in *Verney* v. *Verney* had forgot his own decree only four years before. That the defendant's life was put in by himſelf, and not by the teſtator, can make no difference. The authority, by which he did it, was given by the teſtator.

As to the proportion, if the defendant is to contribute in any degree, the rule, that prevailed in *Verney* v. *Verney*, has very properly ceaſed. The true objection to it is, not, as Lord *Macclesfield* has ſaid, that it is too low, but that it does not at all hit the criterion. The rule adopted in *Nightingale* v. *Lawſon* does. How frivolous is the diſtinction between eſtates for lives and terms for years renewable! In *Barnard* v. *Heaton*, a cauſe by conſent in this court a few days ago, a College leaſe for twenty-one years, renewable every ſeven years, was ſettled for ninety-nine years, if the leaſes ſhould continue to be renewable. The tenant for life had lived out the whole of his intereſt; having exhauſted two or three renewals. Your Honor adopted the rule in *Nightingale* v. *Lawſon*. If the proviſion for renewal is compulſory upon the tenant for life, which is doubtful, it is clear, the charge could not exceed 500*l.* The defendant paid 1170*l.* upon the laſt renewal out of his

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his own pocket; not conceiving, he had any right to charge more than 500*l*. In proceſs of time the fine may increaſe ſo that the intereſt would abſorb the income of the tenant for life. The defendant ſecured, as far as he could, the effect of the teſtator's intention by getting rid of the old life and putting in the lives of thoſe, who were all to take before the plaintiff.

The reverſion in the defendant is in fact nothing. It is clear ſince *Low* v. *Burron*, that a perſon having ſuch an intereſt as the plaintiff may cut off the intereſts of theſe behind by leaſe and releaſe: but there are other modes of doing it. An equitable contract, an agreement, will do it. Articles in Equity, as Lord *Hardwicke* ſays in *Norton* v. *Frecker*, 1 *Atk.* 525, will operate upon it as a recovery upon an eſtate-tail. Then where is the neceſſity of actual poſſeſſion? A man may contract to ſell a reverſion; which will be inforced, whenever he comes into poſſeſſion. The analogy to an eſtate-tail does not hold. In that caſe the concurrence of the tenant for life is neceſſary to a recovery on account of the tenant to the *Præcipe*. That depends upon the Statute *De donis* (*a*); and can be barred only by that particular mode. This intereſt is perfectly unlike that; and is either an anomalous caſe, or a fee conditional at Common Law; and the plaintiff has iſſue. He therefore has it in his power now to diſappoint that intereſt, in reſpect of which the defendant is called upon to contribute; for he may enter into a contract; which will be inforced, when the eſtate comes into poſſeſſion. He has the power of acquiring the abſolute intereſt; and the preſumption is, that he will. The chance cannot be made the ſubject of calculation. *The Duke of Grafton* v. *Hanmer* decides nothing. The Ducheſs might have been called upon to ſurrender only to give effect to the new leaſe: but beſides that it was a family arrangement, in which ſhe concurred without difficulty.

Reply.—All the caſes referred to are, where there was no obligation upon the tenant for life, impoſed by the teſtator or in any other way, to renew; and his own life being in the leaſe, the Court has ſaid, he ſhould not be at the expence of what was done for the benefit of others. He might have refuſed to do any thing or give himſelf any trouble to prevent the expiration of the leaſe: but where the will is compulſory in directing the renewal, no caſe

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(*a*) *Weſtminſter* the ſecond, 13 *Ed.* 1. *c.* 1.

has been cited to ſhew, that it ſhall be at the ſole expence of thoſe in remainder; whoſe benefit the teſtator appears to have had in contemplation. A wearing intereſt given in ſucceſſion with an injunction always to keep it up is like a houſe to be enjoyed by ſucceſſive occupants with an injunction to keep it in repair. That muſt come out of the profits of the thing itſelf, like the caſe of the embankment put by Lord *Thurlow* in *Stone* v. *Theed*. In that caſe and *Nightingale* v. *Lawſon* Lord *Thurlow* allows, that the injunction of the teſtator makes an important difference; and in *Stone* v. *Theed* the expreſſion was merely conſidered equivalent to a direction to keep up the leaſe; not an expreſs and minute declaration, as in this inſtance. *Lock* v. *Lock* is ſtrong to ſhew, the tenant for life has no option; for the firſt taker was held bound to keep up the leaſe only by implication. It clearly was not this teſtator's intention, that the leaſe ſhould drop, if it could not be renewed for 500*l.* That ſum is only given to enable them to do it. The fine muſt depend upon the bargain made and the number of lives, that had dropped. What is neceſſary beyond that ſum muſt come out of the rents and profits as in the caſe, where an embankment is neceſſary, or repairs. The whole muſt be applied, according to Lord *Thurlow*, if neceſſary for thoſe purpoſes; and ſo in theſe caſes: the principal intention being to keep up the leaſe. Whatever is the authority of *Graham* v. *Lord Londonderry*, the act of the defendant in putting in his own life ought not to vary the right of the remainder-man. No anſwer has been given to the objection, that the rule cannot be applied proſpectively. It cannot be known, how much each is to enjoy. There is no doubt of the old rule. The only doubt of Lord *Macclesfield* was, whether the value of the eſtate for life was fairly eſtimated at one-third. *Nightingale* v. *Lawſon* is not applicable: nor *Barnard* v. *Heaton* for the ſame reaſon; the leaſe being for years, and the intereſt determined; therefore it was known, how long they had enjoyed.

Maſter of the Rolls.—The obligation upon them to renew muſt be intended to be compulſory to a certain degree; for *Hyatt* being authoriſed to put in his own life at the expence of the teſtator's perſonal eſtate could have no intereſt in the event of another life dropping to keep the leaſe full, and charge his life-eſtate, which was all he could get, with the intereſt of 500*l.*

I think, there is a right to charge 500*l.* *toties quoties*. It is very plain upon the will. I muſt compel the defendant to join in a mortgage

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mortgage for that ſum: but I can go no farther. The plaintiff will judge, whether it is worth his while to pay the exceſs. If he does, I ſhall order the eſtate to be barred, a ſurrender to be made, and the new leaſe to be to the defendant for life; remainder to the plaintiff and his heirs; for I think, the reverſion may be barred without the concurrence of the tenant for life.

That doctrine of charging one-third upon the tenant for life can never hold. It was a moſt abſurd rule.

July 12th.

Maſter of the Rolls.—Upon the death of *Hyatt*, one only of the lives in this leaſe remaining, of the age of eighty-four, the defendant ſucceeded; and he, what authority he had without the conſent of the remainder-man I do not know, ſurrendered the leaſe; and took a new leaſe for the lives of himſelf and his two brothers; and upon that occaſion he charged the eſtate with 500*l.* under the power given by the will. That he was competent to do, if he was competent to ſurrender the leaſe and take another. Afterwards upon the death of one of his brothers he put in the life of *Hopkins* in addition to his own life and that of his brother; and for that he paid 1170*l.* If he had applied, I do not know, that according to my conſtruction he would not have been entitled to charge another ſum of 500*l.*: but I do not think, he can now make ſuch a demand: the renewal being made without the conſent of the remainder-man. In 1794 upon the death of *John White* there became another vacancy; and conſequently it was competent to the plaintiff to call for an additional life; as he has by this bill.

It is firſt contended, that from the nature of theſe eſtates and the orders and decrees, that have been made upon property of this nature, wherever there is a deviſe of a leaſehold intereſt for lives, and I ſuppoſe it is meant, for years, to ſeveral perſons taking limited intereſts in ſuceſſion, it is competent to every perſon intereſted to call upon the tenant for life to contribute ſome proportion towards the fine upon renewal. I have looked into all the authorities, that were cited; and have not yet found any ſuch principle: on the contrary it appears from the caſe put by Lord

Hardwicke, 1 *Veſ.* 429. of the tenant for life being himſelf one of the *ceſtuys que vie* to have been admitted, that upon a legal eſtate in ſuch a leaſehold intereſt it would not be competent to the remainder-man to call upon him; becauſe he could have no intereſt in the renewal; though he intimates a doubt as to a truſt eſtate, whether the *ceſtuy que truſt* for life, being one of the lives, could be compelled to contribute; as he had no benefit to reſult from the renewal. It is not neceſſary for me to decide that. I am of opinion, there is no one authority, that a remainder-man has a right to call upon the tenant for life to make any contribution upon ſuch an eſtate as this, if the eſtate is a legal eſtate. I do not mean to decide, that if it is to a truſtee in truſt for one for life, and after his deceaſe to others in ſucceſſion, the truſtee might not be authoriſed to raiſe out of the eſtate for life a reaſonable proportion, in order to keep up the eſtate: but I have no difficulty in ſaying, that after the caſe of *Nightingale* v. *Lawſon* I cannot conceive, the doctrine of one-third is in any caſe to be applied. It was a moſt unreaſonable and abſurd rule; for it being admitted, that every perſon is to contribute according to his intereſt, a man of the age of eighty-four, with perhaps not a year to live, muſt be ſaid to have as much intereſt as one of twenty-one. Therefore I have no difficulty in ſaying, that if the tenant for life is called upon to contribute any proportion of the fine, one-third is not the proportion, the Court would now enforce.

Tenant for life of an eſtate for lives being himſelf one of the lives, it is not competent to the remainder-man to compel him to contribute to the expence of renewal, if it is a legal eſtate: Q. if a truſt?

The rule, that tenant for life of an eſtate for lives ſhall pay one third of the expence of renewal, was unreaſonable, and does not now prevail: the fair proportion is, that he ſhall keep down the intereſt, like the deviſee of a mortgaged eſtate.

3 The next queſtion is what is the proportion? The fair proportion is, that the tenant for life ſhall pay the intereſt of the money advanced. What is the caſe of a deviſe in ſtrict ſettlement, charged with a mortgage: ſuppoſe, a bill is filed to forecloſe the mortgage: was it ever contended, that the tenant for life is to pay one-third of the mortgage-money? The decree is always for a mortgage; and if a mortgage cannot be procured, that a proportion of the eſtate ſhall be ſold. In the one caſe the tenant for life would loſe the rents and profits of ſo much of the eſtate as was ſold: in the other he would pay the whole intereſt. Therefore if this defendant is bound to contribute, it ſhould be only by directing him to pay the intereſt; as the teſtator has done in a limited way.

But we muſt in this caſe reſort to the will to ſee, whether the teſtator has intimated an intention, that the eſtate ſhall be kept renewed. I am of opinion, he has done ſo. It is impoſſible to contend, that he did not mean the leaſe to be kept full: but it is

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Tenant for life of an estate for lives being himſelf one of the lives, it is not competent to the remainder-man to compel him to contribute to the expence of renewal, if it is a legal eſtate. Q. if a truſt?

The rule, that tenant for life of a leaſe for lives ſhall pay one-third of the expence of renewal, was unreaſonable, and does not now prevail; the juſt proportion is, that he ſhall keep down the intereſt, like the deviſee of a mortgaged eſtate.

alſo impoſſible to ſuppoſe, he meant, that contribution ſhould be made, which, I think, would be the conſequence, if he had given a mere intimation of an intention to keep the leaſe full: *viz.* that the tenant for life ſhould pay the intereſt. What am I to underſtand by the words "not exceeding 500*l.*"? The teſtator could not ſuppoſe, that would be ſufficient. From the value of the eſtate and the fine paid upon the firſt renewal it is clear, it could not be ſufficient from time to time to pay all the fines, that from the caſualties, that might happen, might be neceſſary. Therefore the only conſtruction, I can put upon the will, is, that, whenever any life drops, it is competent to the tenant to charge any ſum not exceeding 500*l.* for the renewal of each life; but that under the circumſtances the defendant has no right to call upon the remainder-man to ſubmit to a mortgage for that ſum in reſpect of the fine paid by him upon the laſt renewal; for he ought to have applied upon the death of the firſt life, if he intended to avail himſelf of that clauſe: inſtead of that without any conſent he put in firſt the lives of himſelf and his two brothers, and next the life of *Hopkins*. He muſt therefore take upon himſelf the whole burthen of the 1170*l.* he has paid: but upon the true conſtruction of the will I think, he has a right now to call for a mortgage: but that right is limited to 500*l.*; and he cannot call for more as a charge upon the eſtate than that ſum; of which he muſt pay the intereſt.

The caſe of *Verney* v. *Verney*, which is much relied upon to prove, that in all caſes one-third of the fine is the proportion to be paid by the tenant for life, when it comes to be looked into, is no authority whatever; for it expreſsly appears by the order to be by the conſent of the tenant for life. It came on in the year 1749-50 upon the petition of the plaintiff, the ſon, reciting, that the late Maſter of the Rolls deviſed the leaſe to his wife for life, and afterwards to his ſon in tail; that one of the lives was vacant, and the tenant for life ought to contribute a proportion; and ſhe ſubmitted to pay ſuch part, as the Court ſhould direct. It appears, ſhe made no objection; and perhaps her life might be ſuch as to make it a reaſonable proportion. It is impoſſible to inſiſt from that caſe, that Lord *Hardwicke* thought, ſhe was compellable to pay that.

The conſequence of my opinion is, that the plaintiff has a right to call for a ſurrender and renewal of the leaſe; and that 500*l.*

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muſt be charged upon the inheritance of the eſtate: the intereſt of that ſum to be paid by the defendant for his life; and the principal to remain a charge.

In conſequence of this opinion the Court proceeded to refer it to the Maſter to inquire, whether it was for the benefit of the ſeveral perſons intereſted, that the ſum of 1170*l.* or any other and what ſum ſhould be paid for the fine and expences attending the renewal; and in caſe more than 500*l.* ſhould be 3 neceſſary, that the defendant ſhould declare, whether he was willing, that his eſtate in the ſaid leaſehold premiſes ſhould be charged with the intereſt of ſo much money, as it might be neceſſary to borrow beyond the 500*l.*; and if he ſhould conſent, then that the truſts of the new leaſe ſhould be to ſecure the 500*l.* already charged on the premiſes and the intereſt; and next the ſum, the Maſter ſhould find neceſſary to renew the leaſe; and, ſubject thereto, in truſt for the defendant for life; remainder to the plaintiff and his heirs male; remainder to the defendant and his heirs: but in caſe the defendant ſhould not conſent, then that the plaintiff ſhould declare, whether he is willing to advance the farther ſum beyond the 500*l.*; and if he ſhould conſent, then that the truſts ſhould be firſt to ſecure the 500*l.* already charged and the intereſt; and next the farther ſum of 500*l.*, to be applied towards the renewal, and intereſt, and ſubject thereto, in truſt for the defendant for life; and after his deceaſe in truſt to raiſe for the benefit of the plaintiff, his executors, &c, the farther ſum, that he ſhould advance for the renewal, with compound intereſt during the life of the defendant; and ſubject thereto in truſt for the plaintiff, his heirs and aſſigns.

The counſel for the defendant being diſſatisfied with this, as in the latter caſe it would bar the defendant's reverſion, the *Maſter of the Rolls* ſeemed inclined, that it ſhould have that effect; but ſaid, he would write down the minutes himſelf. A few days afterwards the following minutes were delivered out:

"Decree, that the plaintiff is under the will of the teſtator "*Charles White* in the pleadings mentioned entitled to have the "ſum of 500*l.* and no more raiſed by mortgage of the leaſehold "eſtate in queſtion for the purpoſe of procuring an additional life "to the two lives now in being; and decree, that the plaintiff do go "before the Maſter and declare, whether he is willing to advance

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" what ſhall be found neceſſary for that purpoſe beyond the ſum of " 500*l.*; and in that caſe let the defendant *White* and all other " proper parties join in ſurrendering the ſaid leaſe; and let a new " leaſe be taken in the name of two truſtees to be approved of " by the Maſter; and let the truſts thereof be declared to be in " truſt for ſecuring the ſum of 500*l.* and intereſt already charged " on the ſaid leaſe of the premiſes; and in the next place to " ſecure the further ſum of 500*l.* and intereſt, to be applied to- " wards procuring a renewal of the ſaid leaſe; and ſubject to the " ſaid ſeveral ſums of 500*l.* and 500*l.* in truſt for the defendant " for life; and after his deceaſe in truſt to raiſe for the benefit of " the plaintiff, his executors and adminiſtrators, ſuch ſum of " money as ſhall be advanced by him beyond the ſum of 500*l.* " ſo to be raiſed as aforeſaid for the purpoſe of paying the fine " and expences of ſuch renewal and alſo ſuch expences of this " ſuit as ſhall be paid by the plaintiff together with intereſt for " the ſame during the life of the defendant *White* after the rate of " 4*l. per cent. per annum;* ſuch intereſt at the end of every year " to be added to the principal and carry the like intereſt; and, ſubject " to the aforeſaid charges, in truſt for the plaintiff in tail male, with " remainder to the defendant *White*, as heir of the ſaid teſtator, in " fee; and let the plaintiff pay unto the defendant the *Biſhop of* " *Glouceſter*, and the defendant *Thomas Hodgſon*, the mortgagee, " their coſts of this ſuit to be taxed by the Maſter; and reſerve " the conſideration of the reſt of the coſts, until after the ſaid " Maſter ſhall have made his Report; and any of the parties are to " be at liberty to apply to the Court, as there ſhall be occaſion."

on petⁿ by plt for rehearing Note. the decree in this case was affirmed in June 1804 by Lord Chancellor Eldon. See 9. Ves. Jun. 554. But he appears to have dissented from the Master of the Rolls as to some points of general doctrine; & he made a slight addition in the language of the decree.

See further in same case vol. 5. p. 554. rehearing at Rolls [illegible] when amendment was made by allowing him to charge £500 of the £1170. he pd for fine of renewal in 1786.

DICKENSON *v.* LOCKYER.

July 10th, 11th, 12th.

A general deviſee in truſt for the teſtator's widow and children having received from the widow, who was executrix, on her going abroad to recover part of the property, bonds for a debt from him and his partners to the eſtate, in ſettling the affairs of the partnerſhip on the retirement of one partner, who had notice of the truſt, delivered to him the bonds to be cancelled without the privity of the *ceſtuys que truſt*; continuing to make remittances on that account from the funds of the new partnerſhip: the partner, who retired, is not diſcharged.

JAMES FURZE by his will gave to his friend *James Lockyer* all ſuch eſtate and effects, as he ſhould be poſſeſſed of at the time of his death, both real and perſonal, to hold to him, his heirs, executors, adminiſtrators, and aſſigns, upon truſt to permit and ſuffer *Herodia Furze* (the teſtator's wife) to receive and take all intereſt, increaſe, benefit, and advantage, which might ariſe therefrom or thereby, during her natural life, for and towards the ſup-

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part of herſelf and ſuch of his children, as ſhould be living, born of the body of his ſaid wife at the time of his deceaſe, and of ſuch child or children, as ſhe might be then pregnant with; and from and after her deceaſe he gave all ſuch his ſaid real and perſonal eſtate unto and equally between ſuch his ſaid children as tenants in common; and in caſe either of his ſaid children ſhould attain the age of twenty-one years in the life of his wife, then and in ſuch caſe he directed, that the ſum of 100*l.* part of ſuch his eſtate ſhould be paid unto ſuch child or children, and ſhould be conſidered as a part of ſuch their ſhare or portion of his ſaid eſtate; and in caſe but one child ſhould live to attain the age of twenty-one, then he gave after the death of his wife all his eſtate and effects to ſuch only child, his or her heirs, executors, adminiſtrators or aſſigns; and he appointed his ſaid wife ſole executrix.

The teſtator died in 1778, leaving a ſon and a daughter. His widow proved the will.

James Lockyer carried on buſineſs as a timber-merchant in partnerſhip with *Iſaac Bence* and *Thomas Woodward*; and the partnerſhip being indebted to the teſtator in the ſum of 1000*l.* before his death entered into a bond, dated the 20th of *July* 1778, to ſecure that ſum with intereſt. The partnerſhip being farther indebted to the teſtator at the time of his death in the ſum of 350*l.*, *Bence* and *Woodward* after the teſtator's death executed to *Lockyer*, as truſtee in the will, a bond, dated the 20th of *January* 1779, for that ſum with intereſt, in truſt for the ſeveral uſes and purpoſes mentioned in the will. This bond was executed with the privity of *Herodia Furze*; who was then conſulting touching the aſſets and effects of the teſtator with *Lockyer*, who acted principally in the management of the teſtator's affairs. He and his partners reſided at *Briſtol*; which was alſo the reſidence of *Herodia Furze*. In 1781 ſhe went to reſide at *Savannah* in *North America*, in order to recover and get in ſome property of her late huſband ſituated there; and before her departure ſhe delivered the ſaid two bonds to *Lockyer*, as part of the teſtator's eſtate, to be applied by him upon the truſts of the will; and he executed a power of attorney empowering her to collect in the teſtator's eſtate in the Province of *Georgia*. Before her departure ſhe ſettled an account with *Lockyer*, who gave credit for the intereſt due upon the ſaid bonds. She continued to reſide in *Georgia* till her death in 1794; and during the whole of that time the con-

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cerns of the teſtator's eſtate and effects were managed by *Lockyer* with her privity and conſent.

By articles dated in *October* 1785 it was agreed, that the partnerſhip ſhould be diſſolved; *Lockyer* and *Woodward*, who were to continue the buſineſs, undertaking to take the ſtock and pay all the debts; and by indentures, dated the 25th of *March* 1786, the partnerſhip was diſſolved accordingly. Upon that occaſion the creditors were convened; and their accounts were adjuſted by their conſenting to take bonds of *Lockyer* and *Woodward*, and giving up the bonds and ſecurities of *Bence*, *Lockyer* and *Woodward*; and *Lockyer* without any communication with the family of *Furze* delivered up the ſaid two bonds for 1000*l.* and 350*l.* to *Bence* to be cancelled: but no new ſecurity was taken for thoſe ſums. The diſſolution was advertiſed on the 30th of *May* 1786. At that time the partnerſhip was ſolvent; and ſo was *Lockyer* in his private capacity. After the diſſolution the intereſt, as it accrued due upon the two bonds, was remitted to *Herodia Furze* by *Lockyer* out of the funds of *Lockyer* and *Woodward*; and in 1789 *Lockyer* paid to the order of *Herodia Furze* 100*l.* for the uſe of *Anne Elliot*, the teſtator's daughter, on account of the legacy directed by the will to be paid to the children attaining the age of twenty-one. In 1793 *Lockyer* and *Woodward* became bankrupts. The principal cauſe of the failure was, that *Lockyer* had engaged to a conſiderable extent in buildings near *Briſtol*; and upon the war breaking out could not complete his engagements.

The bill was filed by the adminiſtrator *de bonis non* of the teſtator, and *James Furze*, the teſtator's ſon, and *Anne Elliot*, his daughter, with her huſband. The bill prayed, that an account might be taken of what was due upon the two bonds for 1000*l.* and 350*l.*; and that *Bence* might pay what ſhould be found due.

The defendant *Bence* by his anſwer ſaid, that in caſe the ſaid two bonds had not been delivered up to him, he ſhould have retained out of the partnerſhip effects a ſum of money equivalent to anſwer the ſaid debts, and would have ſecured the ſame for the benefit of the children: but well knowing, that *Lockyer* was the deviſee and truſtee of the teſtator's effects, that *Herodia Furze* and all her children were in *Savannah*, and that *Lockyer* had always acted as the agent of *Herodia Furze*, as well during her ſtay in *England* as during her abſence, and finding *Lockyer* in poſſeſſion of the bonds, he conceived, and inſiſts, that *Lockyer* was the only perſon, to whom the ſaid principal moneys could be legally accounted for and paid; as the defendant is adviſed, that *Lockyer* was in Equity entitled under the will to receive all the teſtator's moneys after payment of his debts, funeral expences and legacies; and that the delivery of the ſaid bonds by *Herodia Furze* to him amounted in law to an aſſignment of her intereſt therein; and that this defendant having notice thereof could not retain the money or have paid it to any other perſon.

The defendant *Bence* died pending the ſuit. It was revived againſt his executors.

Attorney General, Mr. Lloyd and Mr. Pemberton for the plaintiffs, having mentioned *Scott* v. *Tyler*, 2 *Bro. C. C.* 432, and *Andrew* v. *Wrigley*, 4 *Bro. C. C.* 125, (which refer to moſt of the caſes upon the general rule, that, unleſs there is colluſion, a purchaſer from an executor is diſcharged,) and having obſerved, that *Nugent* v. *Gifford*, 1 *Atk.* 463, where an aſſignment of the teſtator's mortgage term by the executor in ſatisfaction of his own debt was eſtabliſhed, is not a caſe of much authority, the Lord Chancellor ſaid, he could not conceive, what could be the defence.

Solicitor General, Mr. Grant, and Mr. Romilly for the executors of Bence.—*Humble* v. *Bill*, 2 *Vern.* 444. was reverſed in the Houſe of Lords, 1 *Bro. P. C.* 71: but a number of circumſtances appeared in the Houſe of Lords. It was an appeal not only from that decree but others; and probably upon a new ſtate of circumſtances. A fraudulent decree had been obtained in 1682. Upon all the principles, upon which the pendency of a ſuit is conſidered as notice to every one, it was impoſſible for the Court not to ſay, the party took the aſſignment from the executor with notice, that he was contradicting the order. That caſe therefore proceeds upon ſuch very particular circumſtances, that it does not affect the general rule, except from the firſt impreſſion of the Court. That was the caſe of a ſpecific bequeſt; which is ſtronger than a general bequeſt. *Crane* v. *Drake*, 2 *Vern.* 616. From Lord *Hardwicke*'s obſervations on that caſe in *Nugent* v. *Gifford* it ſeems, the purchaſer knew, the tranſaction was to have the operation of defeating the creditors. In *Ewer* v. *Corbet*, 2 *P. Will.* 148. no particular notice appears. A term was ſpecifically given; which ought to have remained in the ſituation, in which it was, unleſs it was required for debts. There is an eſſential difference between a ſpecific diſpoſition of a term for years and a diſpoſition of a reſidue of perſonal eſtate. *Burting* v. *Stonard*, 2 *P. Will.* 150. is upon the ſame point. *Nugent* v. *Gifford* is often referred to by Lord *Hardwicke*. I cannot conceive, why it is not of authority. Among Sir *Thomas Sewell*'s papers there is a very full note of what fell from Lord *Hardwicke*. That caſe was relied upon by the Maſter of the Rolls in *Andrew* v. *Wrigley*. In *Mead* v. *Lord Orrery*, 3 *Atk.* 235. Lord *Hardwicke* ſays, that upon ſearching the Regiſter's Book it appeared, that there was notice in *Crane* v. *Drake*. *Nugent* v. *Gifford* is there alſo mentioned with approbation; and in *Taner* v. *Ivie*, 2 *Veſ.* 466. there is a general reference to it. It was alſo relied on in *Langley* v. *Lord Oxford* (a) and in *Bedford* v. *Woodham* in the Court of *Exchequer* (b). *Andrew* v.

Wrigley

(a) Reported *Amb.* 17.

(b) The Reporter has been favored with the following Note by one of the Counſel in the cauſe.

Bankrupt, who had obtained his certificate, being poſſeſſed of leaſehold premiſes as executor and reſiduary legatee, mortgaged them to ſecure a debt of his own; and afterwards aſſigned the equity of redemption for valuable conſideration: the deed reciting, that the aſſignment was made for the purpoſe of paying the debts of the teſtatrix. The aſſignee took an aſſignment of the mortgage. The certificate being in an action held to have been fraudulently obtained, the leaſe was claimed by the aſſignees under the bankruptcy: but it was determined, they had no right againſt the aſſignee for valuable conſideration.

In the *Exchequer*. *Bedford* v. *Woodham and Wyatt*, 27th *Feb.* 1790.

This was a bill of interpleader; and the facts of the caſe were theſe:

In *July* 1777 a commiſſion of bankruptcy iſſued againſt *Francis Calx*; and he was found a bankrupt; and afterwards obtained his certificate: but it appeared in an action, which was afterwards brought againſt the bankrupt, that the certificate was fraudulently obtained.

In *October* 1778 *Anne Bontine* being poſſeſſed of a leaſe of certain premiſes for forty-two years died; having made her will; by which, after giving ſome legacies, but not ſpecifically diſpoſing of the leaſe, ſhe gave all the reſidue of her perſonal eſtate to the bankrupt; and appointed him executor.

The bankrupt proved the will; and in *January* 1779, being indebted to *Abel Jenkins* in a ſum of 200*l.* morgaged the leaſe to him as a ſecurity for payment of the debt.

On the 27th of *September* 1785 the bankrupt aſſigned the equity of redemption of the leaſe to the defendant *Mary Woodham* in conſideration of 400*l.* paid to him; and the deed recited, that the debts of the teſtatrix *Bontine* were unpaid; and that this aſſignment was made for the purpoſe of paying thoſe debts.

On the 20th of *September* 1787 the defendant *Woodham* paid *Jenkins* his mortgage debt; and took an aſſignment of the term from him.

The plaintiff, who was occupier of the premiſes, paid the rent to *Woodham* till *January* 1789; when he filed his bill of interpleader againſt *Woodham* and againſt *Wyatt*, who was the ſurviving aſſignee of the bankrupt; ſtating, that the defendants reſpectively claimed this leaſe; and the defendants by their anſwers both claimed to be entitled to it.

Mr. Spranger for defendant Wyatt contended, that *Calx* being in the ſituation of an uncertificated bankrupt, and this leaſe being property, which he became beneficially entitled to ſubſequent to his bankruptcy, his aſſignees were entitled to it to diſtribute among his creditors. He admitted, that if the bankrupt took the leaſe as executor merely, the aſſignee under the commiſſion would have no title to it: but he contended, that he took it in this

caſe

Wrigley is eſſentially different from theſe caſes. The Maſter of the *Rolls* took great pains in that caſe: and ſtated what appears in the Regiſter's Book with regard to *Nugent* v. *Gifford*. The principle upon theſe caſes is, that unleſs there is ſomething improper in the conduct of the party, the tranſaction cannot be impeached.

In this caſe *Lockyer* acted throughout as agent of Mrs. *Furze*. After the debts were paid, the reſidue was properly to be in the hands of *Lockyer*. There was no fraud in the tranſaction. It is impoſſible to impute any thing to *Bence* but want of ſufficient caution. *Lockyer* from the diſſolution of the partnerſhip down to 1792 proceeded in remitting to Mrs. *Furze* the intereſt upon theſe ſums of 1000*l.* and 350*l.*, as ſums, with which he charged him-

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caſe as reſiduary legatee; that he had acted upon it, not as executor, but as the perſon beneficially entitled to it; for he had mortgaged it to *Jenkins* to ſatisfy a debt of his own; and though the aſſignment of the equity of redemption to *Woodham* might be made as executor, and to pay the teſtatrix's debts, yet the defendant *Woodham* claiming the legal eſtate through *Jenkins*, if the aſſignment to *Jenkins* was bad, the defendant's claim muſt be bad.

Mr. Burton and Mr. Romilly for defendant Woodham inſiſted, that the aſſignees had no title to the leaſehold premiſes; that it was clear, that the legal eſtate in the leaſe was not veſted in the aſſignees: it would not have veſted in them, if the teſtatrix had died before the bankruptcy; and therefore could not have veſted in them, when it came to the bankrupt after bankruptcy.

No effects, which a bankrupt holds in *auter droit* veſt in his aſſignee. In 3 *Burr.* 1369. it is laid down by Lord *Mansfield*, that if an executor becomes bankrupt, the Commiſſioners cannot ſeize the ſpecific effects of the teſtator; not even money, which can be ſpecifically diſtinguiſhed, and aſcertained to belong to the teſtator. The only title therefore of the aſſignee muſt be an equitable title, and the bankrupt muſt be conſidered as a truſtee for the creditors of the teſtator, till their debts are paid, and then as a truſtee for his own aſſignees. The ſituation of the aſſignee therefore muſt be the ſame as that of a reſiduary legatee; and there is no doubt, that a reſiduary legatee will be bound by aſſignments of the teſtator's property made by the executor for valuable conſideration in every caſe but where there is colluſion: *Ewer* v. *Corbet*, 2 *P. Will.* 148. and even though the executor made an aſſignment of the teſtator's effects to ſatisfy a debt of his own, ſtill neither the reſiduary legatee nor creditors of the teſtator could follow the property in the hands of the purchaſer, as was held in *Nugent* v. *Gifford*, 1 *Atk.* 463., and Lord *Hardwicke* there ſaid, that it was objected, that it was a *devaſtavit*; becauſe the conſideration was a debt of the executor's own; but that there was no difference between that and money paid down; provided it were done *bonâ fide*: a ſum of money *bonâ fide* due being as good and valuable a conſideration as any.

Eyre, Chief Baron, ſaid, that theſe caſes were directly in point; and that there was no pretence to ſay, that the aſſignee under the commiſſion had any title to this leaſe; which had been aſſigned for valuable conſideration.

Hotham and *Perryn*, Barons, of the ſame opinion.

Thomſon, Baron, abſent.

ſelf upon the ground of the tranſaction between himſelf and his partners. In 1789, the plaintiff Mrs. *Elliot* having attained twenty-one, he paid her 100*l.* under the directions of the will. There was no other fund for payment of that ſum unleſs the capital of this fund. That was notice, that *Lockyer* was receiving and paying the teſtator's eſtate. Some attempt is made to ſupport this demand againſt the eſtate of *Bence* from what paſſed in 1781, when Mrs. *Furze* depoſited the bonds with *Lockyer:* but that imports the contrary; for it was not neceſſary for the purpoſe of receiving the intereſt. The evidence ſhews, *Lockyer* had full authority upon the ſubject. It is admitted, that payment to *Lockyer* would have been good, if in money; and that he having the management of the property might have given a ſufficient diſcharge. The caſes alluded to of ſales by executors, where it is not neceſſary to ſell for the purpoſes of the will, do not apply to the caſe of a debtor; for he has nothing to do but to pay his debt to a perſon having proper authority to receive it. He has nothing to do with the application. Is there any difference between actual payment and a ſettlement in account? In *Baldwin* v. *Billingſley*, 2 *Vern.* 539. which aroſe upon a ſettlement of accounts, the obligor was held chargeable only upon the ground, that the truſtee had not the bond in his poſſeſſion; being evidence, that the truſtee was not intended to have the power of receiving the money. Mrs. *Furze* had intruſted *Lockyer* with the poſſeſſion of the bond; and ſhe muſt have conceived, that he had authority to receive the money; for it is proved, that with her conſent he paid the 100*l.* upon Mrs. *Elliot*'s coming of age. He received it, and paſſed it in account, in conſequence of the general authority, he had by poſſeſſion of the bonds. *Bence* therefore having acted fairly ought not to be called upon to pay this a ſecond time.

Lord Chancellor.—It is not neceſſary for me in this cauſe to conſider, how far perſons, who are dealing with an executor, who has the legal property and a title to adminiſter all the effects, ſhall be liable in this court in reſpect of any tranſaction, either for payment of a debt without being called upon, or a purchaſe for valuable conſideration, with a perſon ſtanding in all theſe rights, and perfectly protected at law. I ſhould not have much reluctance, as a general rule, to hold, that, unleſs fraud is imputed to them, they are ſafe in this court; eſpecially if they ſtand in the ſituation of purchaſers for valuable conſideration; and if they ſtand in the

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ſituation of debtors, who voluntarily paid their debts to the executor, a pretty ſtrong caſe would be neceſſary to make them liable to pay it over again; being paid in a legal courſe and to a perſon having a right to call upon them. The executor has the whole legal property; and he is bound to pay the debts; therefore his converſion of the aſſets cannot be quarrelled with. It may be neceſſary: it may be fraudulent: but unleſs it is fraudulent, and that appears, this court will not interfere. *Nugent* v. *Gifford* was the caſe of an executor. I ſhould not at all diſagree with the caſe of an executor: but what was *Lockyer*'s ſituation? What was his legal power? He was no executor: he is deviſee nominally, it is true, of all the effects. The widow is the executrix. He is deviſee; but in truſt to hold the effects, when liquidated, (the whole adminiſtration being confided to the widow,) and to pay to the widow for life and afterwards to the children; with power to advance to each of the children, that ſhould attain the age of twenty-one in the life of their mother, the ſum of 100*l.* He only ſtands in the character of a truſtee. The executrix goes abroad, it is admitted, to recover part of the effects ſituated at *Savannah.* The two bonds were left, and very properly left, in the hands of *Lockyer* in *England.* There could be no uſe in carrying them to *America.* The money due upon them might be paid. If they were paid, having the money in his poſſeſſion he would be bound by the truſt. He might be an unfaithful truſtee: but the confidence placed in him by the teſtator was a good reaſon for the executrix to truſt him, while ſhe was abroad.

Then what is the tranſaction? *Bence* had notice of the truſt; for he and *Woodward*, when they ſettled the ſimple contract debts of the partnerſhip, ſettled the debt of 350*l.* due to the teſtator. The mode, they took, which was not the beſt, was by giving their bond to *Lockyer.* They could not give it to him upon any other ground, than that he was truſtee for the family of *Furze.* That fixes them with the notice of the truſt. Then without the authority of the executrix, without the leaſt title of communication with her, as far as appears without her knowledge, they enter into this agreement. The only circumſtance, from which that authority is inferred, is, that the buſineſs of the 1000*l.* and 350*l.* was tranſacted by *Lockyer* as his own affair: but ſo that ſhe received the remittance, it was the ſame to her, whether ſhe received it from the one partner or the others. The payment and remittance to her

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from time to time upon that account could not give her any idea of the tranſaction, that took place between them. The effect of the agreement, they then entered into, was nothing more than that upon the good opinion, which on very reaſonable grounds they entertained of *Lockyer*'s ſubſtance, the ſecurity of the old partnerſhip was exchanged for that of *Lockyer* and *Woodward*. *Bence* did not take a bond of indemnity: but another method was adopted. They took the ſeal off the bond: but that is not payment. Then what is the conſideration? There is no conſideration *quoad* the eſtate of *Furze*: but it is a perſonal conſideration to the truſtee; leaving more of the ſtock in the hands of the partnerſhip, than *Bence* would have thought prudent, if he had ſeen the poſſibility of being again called upon for this debt as well as the others, which he took better care to have ſecured by getting the bonds delivered up upon taking new bonds from the two. This would not do as payment at law. *Bence* being jointly bound with *Lockyer* and *Woodward* agrees with them, that they ſhall pay this debt, and relieves himſelf: and upon that conſideration he gives them his ſhare of the fund, with which this debt was to be paid. That can never be made a payment. The queſtion in this court is, whether the truſtee of a bond can without the *ceſtuy que truſt* releaſe the obligor. This is a very particular caſe; for he is debtor with the two others. They cannot by management among themſelves deſtroy that ſecurity. There was no real payment of money into the hands of *Lockyer*, as money belonging to the eſtate of *Furze*, to be laid out according to the will. Three co-obligors in a bond by a tranſaction between themſelves agree, that one ſhall be diſcharged, and the whole ſecurity reſt upon the two without the privity of the executor. To go a ſtep farther; take the ſituation of *Lockyer* by the will merely as truſtee: if payment is made to a truſtee, and there is very ſlight evidence of aſſent by the executor, I ſhould hold it a good payment to the perſon intruſted to lay out the money: but this is not receiving the money, but agreeing to leſſen the ſecurity; and letting the money be employed in the trade; there being a much broader and better ſecurity, upon which it reſted before. It is very near the caſe of *Crane* v. *Drake*. I do not impute to them any idea, that any harm would come of it. The evidence very clearly explains the miſtake of *Bence*; for *Lockyer* appears to have taken the whole upon himſelf; which, as between the obligors, he might very well do: but no act of his can affect thoſe claiming under *Furze*; for *Lockyer* was the proper hand to pay. Then ſettling the new partnerſhip they give confidence to him.

It is not neceſſary to inquire, what would have been the caſe, if actual payment had been made, and the money was in the hands of *Lockyer*. It would have depended a good deal upon the authority given by the executrix to him to act. If the two others had actually paid their ſhares of the bond into the hands of *Lockyer*, perhaps with all the evidence of the confidence repoſed in *Lockyer* and his being truſtee in the will, it would be very difficult for the Court to make them anſwerable: but what they have done is nothing like that. By the agreement with him they have reduced the ſecurity of the truſt from the bond of the three to the perſonal ſecurity of the two. All the conſideration was perſonal to *Bence* and *Lockyer*; not in the leaſt affecting the eſtate.

Therefore the repreſentative of *Bence* muſt account. Let an account be taken of what is due upon the two bonds: the plaintiffs to be at liberty to prove the debt under the commiſſion.

I will not give coſts. It is a very hard caſe. They all meant well; and if he had aſked for an authority, I have no doubt, he would have had it.

MELLISH *v.* MELLISH.

Rolls,
July 12th.

A will cannot be varied upon the ground of miſtake; unleſs the alledged miſtake is clearly inconſiſtent with the intention upon the whole will.

SAMUEL MELLISH by his will, dated the 5th of *June* 1777, diſpoſed thus:

"I give and bequeath unto my natural daughter, whom I had
" by *Mary Roſs*, the ſum of 3000 *l.* 3 *per cent.* Government ſe-
" curities, payable upon her attaining her age of twenty-one years
" or day of marriage; and in caſe of her death before that time
" I direct, that the ſaid legacy ſhall be conſidered as part of the
" reſidue of my eſtate hereinafter diſpoſed of:"

The teſtator then gave to his houſekeeper *Mary Whitaker* the ſum of 200 *l.* and the uſe of all his houſehold goods, plate, linen, and furniture, and an annuity of 100 *l.* for her life; and he gave to his nephew *Peter Melliſh* 1000 *l.* for his trouble in executing his will, and an annuity of 100*l.* for his life; and he directed, that ſtock ſhould be purchaſed, ſufficient to anſwer the ſaid annuities; and that upon the reſpective deaths of the annuitants the ſaid ſtocks and the ſaid furniture and effects ſhould be conſidered as part of the reſidue of his eſtate and effects; and he directed all his real eſtate, goods and chattels, to be ſold, and that the money ariſing from the ſale ſhould be inveſted in Government ſecurities; and the whole ſo inveſted, ſubject to the two ſaid annuities, and all other the reſt, reſidue, and remainder, of his eſtate and effects, whatſoever and whereſoever, and of what nature, kind or quality, the ſame ſhould be, "I give and bequeath the ſame unto and "among my natural children *Mary*, *Samuel*, *Thomas*, *Fanny*, and "*Charlotte*, whom I have had by my ſaid houſekeeper *Mary* "*Whitaker*, equally to be divided between them ſhare and ſhare "alike as and when the ſaid ſons ſhall reſpectively attain the age "of twenty-one years or days of marriage: provided always, and "I do hereby direct that in caſe of the death of any of them the "ſaid *Ann Mary Fanny* and *Charlotte* before their reſpective "ages of twenty-one years or days of marriage or of the ſaid "*Samuel* or *Thomas* before the age of twenty-one years without "a child or children then ſurviving, who ſhall attain the age of "twenty-one years, then and in ſuch caſe I give and bequeath "the part, ſhare or ſhares, of him, her or them, ſo dying unto "the ſurvivors of them, ſhare and ſhare alike, to be divided "among them at the time appointed for the diviſion of their "original ſhares: but in caſe all my ſaid children but one, ſhall "happen to die and the ſons without iſſue as aforeſaid without "ſuch attainment as aforeſaid, then I give, deviſe, and bequeath, "the whole reſidue of my eſtate and effects unto ſuch only ſurviving child:" Provided, that in caſe either of his ſaid ſons dying before twenty-one ſhall leave a child or children, who ſhall attain that age, he gave ſuch child or children their father's ſhare and intereſt in the ſaid reſidue, equally, ſhare and ſhare alike: "provided farther, and my mind and will is, that in caſe any of "my ſaid natural daughters ſhall happen to marry, before they "attain their ages of twenty-one years without the licence and "conſent of my executors in writing for that purpoſe firſt had "and obtained, then and in ſuch caſe I direct, that my executors "ſhall ſtand poſſeſſed of one moiety of her portion or fortune, "and the intereſt, that ſhe ſhall be entitled to by virtue of this "my will, in truſt to pay the intereſt, dividends, and profits, "thereof unto my daughter during her coverture" for her ſeparate uſe; "and from and after the deceaſe of her huſband, and ſhe "having obtained the age of twenty-one years, in truſt to pay and "transfer to ſuch daughter the ſaid moiety ſo to be held by them "in truſt as aforeſaid: Provided always, that in caſe ſuch daugh"ter ſhall depart this life in the life-time of ſuch huſband, hav"ing one or more child or children," who ſhall attain the age of twenty-one, the truſtees ſhall ſtand poſſeſſed thereof in truſt for ſuch child or children in equal ſhares and proportions: but in caſe ſhe ſhall depart this life without any child or children, who ſhall attain twenty-one in the life-time of ſuch huſband, then the ſaid moiety ſhall ſink into the reſidue before diſpoſed of. He appointed *Mary Whitaker* ſole guardian "of my ſaid children by "her;" directing, that they ſhould remain under her care and tuition, until the ſons ſhould attain twenty-one reſpectively, and the daughters twenty-one or marriage, ſo as ſhe ſhould continue ſole and unmarried; and he appointed *Mary Whitaker* and *Peter Melliſh* executors; empowering them to apply ſo much of the intereſt, dividends, produce and profits, of his ſaid eſtate and effects in the maintenance and education "of my ſaid children," as they ſhould think proper and ſuitable to their reſpective ages, alſo in putting out "my ſaid ſons" apprentices: the ſurplus of the ſaid intereſt, *&c.* to be laid out and conſidered as part of the reſidue: Provided always, that in caſe *Mary Whitaker* ſhould marry, it was his expreſs will and mind, that ſhe ſhould no longer interfere with the maintenance and education "of my ſaid children "or in the truſts hereby created" or otherwiſe in the execution of the will; and in that caſe he appointed *Peter Melliſh* ſole guardian "of my ſaid children for the time aforeſaid and exe"cutor of my will."

By a codicil, dated the 17th of *December* 1781, reciting, that he had two natural children by *Mary Whitaker* ſince the date of his will, *viz. Eſther* and *Harriet*, which, it was his intention, ſhould be equally provided for with his other natural children by her in the ſaid will named, as well as all ſuch other children as he might have by her, or wherewith ſhe ſhould be *enſient* and bear within nine months after his deceaſe, he directed, that "the ſaid "children now born or hereafter to be born ſhall have an equal "ſhare and proportion of my eſtate and effects with my ſaid other "children named in the ſaid will by the ſaid *Mary Whitaker*, and

“ to be entitled to the benefit of ſurvivorſhip and under the ſame limitations and directions, and in general in the ſame manner, as if they were actually named in the ſaid will with their brothers and ſiſters, who are thereby provided for; and whereas I have miſnamed the mother of my natural daughter *Ann*, her mother's name being *Elizabeth* inſtead of *Mary*, as in the ſaid will mentioned, I hereby confirm the ſaid legacy given by my ſaid will to my ſaid daughter *Ann*.”

Ann Roſs attained the age of twenty-one in 1778. The teſtator died in 1784. His daughter *Harriet* died in 1794 under the age of twenty-one and unmarried.

The bill was filed by the ſurviving children of the teſtator by *Mary Whitaker* againſt *Peter Melliſh* and *Ann Roſs* to have the will and codicil eſtabliſhed; and the queſtion was, whether *Ann Roſs* was entitled with the plaintiffs to the benefit of ſurvivorſhip as to the ſhare of the teſtator's daughter *Harriet*?

Maſter of the Rolls.—When this cauſe came on to be heard, it ſeemed to be the opinion of the plaintiffs, who filed their bill to compel the defendant *Ann Roſs* to relinquiſh any intereſt, ſhe might have in the reſidue of the perſonal eſtate of her natural father, that it was a very plain relief againſt her. The only queſtion aroſe upon a doubt, whether the name “*Ann*” in the clauſe of ſurvivorſhip was interpoſed by mere miſtake. When firſt it was opened, I was very much inclined to think, the miſtake was ſo apparent, that the Court could have excluded her: but upon very mature conſideration of this will I think, I ſhould do too much violence to the words, if I was to indulge in ſpeculations, whether the word “*Ann*” did or did not creep into the will by mere miſtake. He begins by giving *Ann Roſs* 3000*l.* payable at the age of twenty-one or marriage; and in caſe of her death before that time he directs that legacy to be conſidered as part of the reſidue of his eſtate: ſo that it is taking that ſum out of the reſidue to fall into it again in that event. Then, ſubject to ſome legacies and annuities, he gives the reſidue among his other children; and then comes the clauſe of ſurvivorſhip; upon which it is contended, that the words “ part, ſhare or ſhares” are ſo confined to the reſidue, that it is impoſſible, that the legacy of *Ann Roſs* can be included. The queſtion is, can I ſee ſufficient to enable me to declare, that demonſtrably and incontrovertibly the name of "*Ann*" has crept in by mere miſtake. I really believe, it was ſo: but I dare not as a Judge take upon myſelf to ſay, this word cannot be reconciled with the reſt of the will; and I always underſtood, that where there is a miſtake or an omiſſion, all, the Court has to do, is to ſee, whether it is poſſible to reconcile that part with the reſt, and whether it is perfectly clear upon the whole ſcope of the will, that the intention cannot ſtand with the alledged miſtake or omiſſion.

There is another part of the will, upon which I ſhould be glad to know, whether it is poſſible to exclude *Ann Roſs*; the proviſo, that in caſe any of his ſaid natural daughters ſhould marry before the age of twenty-one without conſent of his executors, they ſhall ſtand poſſeſſed of one moiety of her *portion or fortune*, not *part or ſhare of his perſonal eſtate*, and the intereſt, in truſt &c. Is it poſſible I ſhould exclude *Ann Roſs* from the operation of this clauſe? It is to be obſerved, that *Ann Roſs* was a minor at the time of making the will: conſequently there was a chance of ſurvivorſhip. If ſhe had been of age at that time, I ſhould have thought the inſertion of her name a clear miſtake; for then the chance of ſurvivorſhip, he creates, could not ariſe with regard to her. Upon the whole therefore there is not ſufficient upon this will to denote, that the name of *Ann Roſs* was inſerted by a clear clerical miſtake without any intention of the teſtator.

Upon the codicil, which is not otherwiſe material, one obſervation ariſes; that he had read over the will with a view to prevent any miſtake; and he has attempted to be ſo accurate, that he takes notice, that the legacy to *Ann Roſs* is given to her as the child of *Mary Roſs*, whereas her mother's name was *Elizabeth Roſs*. If the will contained ſo capital a miſtake as the inſertion of the name of his daughter *Ann Roſs* without any intention to do ſo, one would expect, that he would have noticed that as well as the other ſlight miſtake.

Upon the whole the queſtion is, whether there is a clear demonſtrable miſtake? I admit, if it is proved a miſtake upon compariſon with other parts of the will, it ought to be rectified. *Hampſhire* v. *Pearce*, 2 *Veſ.* 216. the principle of which I very much approve, is an authority to ſhew, with what caution the Court

conduct

conduct themſelves in renouncing any part of the will. In that caſe it might have been as reaſonable to indulge a ſpeculation, that the four children of *Bamfield* were the children intended, as to make the ſpeculation in this caſe: but the Maſter of the Rolls would not indulge that ſpeculation; and I think, he did right. The rule is, that wherever there is a clear miſtake, or a clear omiſſion, recourſe is to be had to the general ſcope of the will, and the general intention to be collected from it: but the firſt thing to be proved is, that there is a miſtake. I do not find enough to convince me, that there is a miſtake; and whenever it comes to be a doubt, the ſafeſt way is to adhere to the words. Is the expreſſion "part, ſhare or ſhares" ſo emphatical as to make it impoſſible to ſuppoſe *Ann Roſs* intended to be included? I am of opinion, it is not.

I have looked into a caſe, I have often had occaſion to refer to: *Denn* v. *Bagſhaw*, *6 Term Rep. B. R.* 512. in which the Court of *King's Bench* were of opinion, that if they could reject the words, "if living at the time of her death," that conſtruction would be moſt deſirable. Lord *Kenyon* ſays, "If I could make inſtead of "conſtructing this will, I ſhould ſay, that the nephews of the de-"viſor are ſo amply provided for in the former part of this will, "that they ought not to inſiſt on diſinheriting the heir at law; "which they will do by enforcing this will: but I am not at liberty "to indulge my wiſhes upon the ſubject."

A conſtruction may be put upon the word "*Ann*," not inconſiſtent with the other parts of the will; and therefore I am bound to give the conſtruction, the words import; and conſequently am clearly of opinion, the defendant *Ann Roſs* is entitled.

One part of the will, that is material, I forgot to mention: the clauſe, which provides for the event of the death of all the children but one. The conſequence would be, that if *Ann Roſs* was excluded, though ſhe ſhould have been the ſurvivor, he would have died inteſtate. (*a*)

(*a*) See the next caſe.

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Rolls.
July 12th, 16th.

Miſtake in a will corrected upon the clear intention appearing on the whole will.

The capital of the reſidue paſſed by implication; though the intereſt and dividends only were expreſsly diſpoſed of.

Benjamin Bond *Hopkins* by his will, after appointing his brother-in-law *George Chamberlaine*, his wife *Jane Hopkins*, *George Bond*, and *Samuel Hayes*, and the ſurvivor of them, guardians of his daughter *Caroline Bond Hopkins*, and appointing *Chamberlaine*, *Bond*, and *Hayes*, executors, gave and deviſed his leaſehold meſſuage or dwelling-houſe at *Clapham* and three freehold fields adjoining with the appurtenances to the uſe of his executors, their heirs, executors, adminiſtrators, and aſſigns, in truſt nevertheleſs for his ſaid daughter *Caroline Bond Hopkins*, her heirs, executors, adminiſtrators, and aſſigns, for ever. He alſo gave and deviſed his eſtate at *Cambridge* heath in the ſame manner, and deſcribed the ſame truſt. He gave and deviſed all his manors, meſſuages, farms, lands, &c. and real eſtates in the county of *Surrey* (except his dwelling-houſe, erections, &c. pleaſure-grounds, farms, &c. known by the names of *Painſhill* and *Fairmile* farm, and his manſion-houſe at *Byfleet* with the gardens, meadows, farms, &c. thereto belonging, and except a ſmall houſe at *Wimbledon* with the appurtenances) to the uſe of his ſaid executors, their heirs, executors, adminiſtrators, and aſſigns, and all the reſt of his eſtates in the ſaid county of *Surrey*, in truſt alſo nevertheleſs for his ſaid daughter, her heirs, executors, adminiſtrators, and aſſigns, for ever, and to convey the ſame to his ſaid daughter, her heirs, executors, &c, for ever, upon her attaining the age of twenty-four years, or marrying under that age (by the conſent of his ſaid executors or any two of them or the ſurvivor of them), which ſhould firſt happen; and he directed, that the ſaid truſtees and the ſurvivor and his heirs ſhall out of the rents and profits of the ſaid eſtate ſo deviſed to them in truſt, as aforeſaid, allow and pay any ſum not exceeding eight hundred *per annum* for the maintenance and pocket expences of his ſaid daughter until ſhe ſhall attain the age of twenty-one, or marry under that age with ſuch conſent, as aforeſaid; and that they ſhall inveſt the ſurplus of the rents and profits of the ſaid eſtates (ſo deviſed in truſt as aforeſaid) from time to time during his ſaid daughter's minority, until ſhe ſhall be entitled to have a conveyance of the ſame eſtates, in the Public Funds, to accumulate for her benefit, until ſhe ſhall attain the age of twenty-four years, or marry under that age with ſuch conſent as aforeſaid; when ſuch accumulations

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are to be paid or transferred to her. He gave, deviſed and bequeathed, his ſaid excepted manſion-houſe at *Byfleet* aforeſaid with the gardens, meadows, farms, *&c*, thereto belonging, to the uſe of *George Chamberlaine*, his heirs and aſſigns for ever; and the excepted houſe in *Wimbledon* to the uſe of his ſteward *George Muras*, his heirs and aſſigns for ever. He gave, deviſed and bequeathed, his ſaid excepted meſſuage, *&c*, of *Painſhill* and *Fairmile* farm, from and immediately after his deceaſe, and alſo all and ſingular his other real eſtates in *London*, and in the counties of *Middleſex* or *Eſſex* or elſewhere in *England* to the uſe of his ſaid executors and their heirs, executors, adminiſtrators or aſſigns, for ever; upon truſt to ſell the ſaid eſtates; and he alſo willed, that his ſaid truſtees ſhould ſell by auction all his houſehold furniture at *Painſhill*, except books, jewels, plate, pictures and prints, live ſtock upon his farm, carriages, farm-horſes, harneſs, and farming utenſils (unleſs the purchaſer of *Painſhill* ſhould chooſe to take them at an appraiſement from his ſaid truſtees as aforeſaid); and he directed, that his truſtees ſhould pay, apply, and diſpoſe of, the money ariſing by ſuch ſale or ſales, and alſo the rents and profits of his ſaid ſeveral eſtates in the mean time, until the ſame ſhall be ſold, in the manner and for the intents and purpoſes hereinafter expreſſed. He gave and bequeathed the jewels (late the property of her mother) to his ſaid daughter; alſo his library of books at *Painſhill*, all his pictures, prints and books of prints there (except thoſe executed in the ſtucco at *Painſhill*) to his ſaid daughter. He gave, deviſed, and bequeathed, the leaſe of his houſe in *Groſvenor-ſquare*, all the houſehold furniture, pictures, books, china, glaſs, prints, *&c*, in the ſaid houſe, and alſo his ſideboard of plate, liquors in the cellars there and at *Cobham*, to his dear wife *Jane Hopkins*; and he gave and bequeathed all and ſingular his monies, ſecurities for money, mortgages in fee and for years, and the manors, lands, hereditaments and premiſes, therein compriſed, and all the reſt and reſidue of his real and perſonal eſtate, not hereinbefore particularly bequeathed, to his ſaid executors, and their heirs, executors, adminiſtrators and aſſigns, according to the nature and quality of the ſame premiſes reſpectively, upon truſt to ſell and diſpoſe of and convert into money the whole of his ſaid real and perſonal eſtate not hereinbefore ſpecifically bequeathed, except ſuch part thereof conſiſting of funds or ſecurities, as ſhall not be neceſſary to be ſold to anſwer the purpoſes of his will; and to apply the money thence ariſing, and ſtand poſſeſſed of ſuch funds or ſecurities, as ſhall not be ſold, upon the truſts and for the intents and purpoſes hereinafter declared; and he directed, that his ſaid truſtees and the ſurvivor of them or his executors and adminiſtrators ſhall ſtand and be poſſeſſed of or intereſted in all the monies ariſing as well from the ſale of his ſaid real eſtates and from his perſonal eſtate not ſpecifically bequeathed as from the rents, profits, intereſt and proceeds, reſpectively, which ſhall ariſe from his ſaid real and perſonal eſtates in the mean time and until ſuch ſale or ſales, diſpoſition and converſion, as aforeſaid, in truſt, that his ſaid truſtees and the ſurvivor, his heirs, executors, *&c*, ſhall pay all his juſt debts, funeral expences, *&c*, and the ſeveral legacies hereinafter mentioned.

The teſtator then gave eight thouſand pounds to his wife: five thouſand pounds to his ſiſter *Elizabeth Chamberlaine*; and ſome other legacies. He gave to his ſervant *George Neaves* one hundred pounds to be inveſted in the Funds for the benefit of his ſon *Benjamin Neaves*, to accumulate, till he ſhould be twenty-one; and ſhould he die during his minority, the principal and intereſt to become the property of the ſaid *George Neaves*, his heirs, executors, adminiſtrators or aſſigns. He gave and bequeathed to the Humane Society for the recovery of drowned perſons or from apparent ſudden death . He gave to *George Bond* and *Samuel Hayes* five hundred pounds for their trouble as executors and guardians of and truſtees for his child; and he directed his ſaid truſtees and the ſurvivor, his executors, *&c*, to lay out and inveſt all ſuch monies ariſing from his ſaid real and perſonal eſtates, and from the rents, intereſt and produce, thereof, as ſhall not be applicable for the purpoſes aforeſaid, upon Government or real ſecurities, and ſtand poſſeſſed of the funds ſo to be purchaſed, and alſo of ſuch ſtocks, funds, or ſecurities, being part of his perſonal eſtate, as ſhall not be neceſſary to be ſold to anſwer the purpoſes aforeſaid, upon truſt to pay out of the intereſt and dividends thereof the ſeveral annuities following. Then after giving ſeveral annuities the teſtator proceeded thus:

"And upon further truſt, that my ſaid truſtees or the ſurvivor "of them, his executors or adminiſtrators, do and ſhall out of "the intereſt and dividends of the ſaid ſtocks, funds, or ſecurities, "ſo to be veſted in them, pay unto my ſaid daughter *Catherine* "*Bond Hopkins* from the day of her attaining the age of twenty-"one years to the day of her attaining the age of twenty-four "years or marrying under the laſt-mentioned age with ſuch "conſent as aforeſaid the annual ſum of eight hundred pounds

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" as and for intereſt upon the ſum or legacy of Twenty thouſand
" pounds hereinafter directed to be paid to her, and alſo do and
" ſhall by ſale of a ſufficient part of the ſaid ſtocks, funds, or
" ſecurities, raiſe the ſum of Thirty thouſand pounds and pay the
" ſame to my ſaid daughter *Catherine Bond Hopkins* upon her at-
" taining the age of twenty-four years or marrying under that
" age with ſuch conſent as aforeſaid; and I direct, that all the ſaid
" annuities by me hereinbefore given as well as the ſaid annual
" ſum of eight hundred pounds to my ſaid daughter ſhall be paid
" quarterly upon the 25th day of *March*" &c.: the firſt payment of the ſaid annuities (except the ſaid annual ſum given to his daughter) to be made upon the firſt day of payment after his deceaſe; " and the firſt payment of the ſaid annual ſum of eight
" hundred pounds to be made upon ſuch of the ſame days, as ſhall
" firſt happen after my ſaid daughter ſhall attain the age of twenty-one
" years; and I will and direct, that my ſaid truſtees or the ſurvivor
" of them, his executors, adminiſtrators, or aſſigns, ſhall pay all the
" reſt, reſidue and ſurplus, of the dividends and intereſt of the
" ſtocks, funds and ſecurities, which ſhall be veſted in them, and ſhall
" remain from time to time after anſwering the ſeveral purpoſes
" aforeſaid, unto and among ſhare and ſhare alike my daughter
" *Catherine Bond Hopkins*, my nieces *Elizabeth* and *Marianne*
" *Caroline*, and my ſon *Henry Turner*, alias *Henry Murray*, alias
" *Henry Hayes*, and the ſurvivor of them, each ſhare to be paid
" them, as they ſeverally attain the age of twenty-one years; and
" if any one of the ſaid four perſons ſhall die, before they attain
" the ſaid age of twenty-one, the ſhare of the ſaid deceaſed ſhall
" be divided equally between the three ſurvivors, or if two die,
" equally between the two ſurvivors; or ſhould three out of the
" ſaid four perſons die during their minority, the ſurvivor is to
" be entitled to the whole reſidue and ſurplus aforeſaid:"

Then after giving his truſtees power to make leaſes he directed, that if his ſaid daughter ſhall die under the age of twenty-four years without having married with ſuch conſent, as aforeſaid, then his ſaid truſtees and the ſurvivor and his heirs ſhall ſtand and be poſſeſſed of the ſaid real eſtates in the counties of *Surrey* and *Middleſex* hereinbefore deviſed to them in truſt for his ſaid daughter, as aforeſaid, upon ſuch and ſo many of the truſts, and to and for ſuch and ſo many of the intents and purpoſes, and under and ſubject to ſo many of the proviſoes, hereinbefore contained and declared concerning the ſaid other real eſtates deviſed to his ſaid truſtees in truſt to be ſold, as aforeſaid, as ſhall be then in being, undetermined, and capable of taking effect; "and then "alſo and in ſuch caſe the legacy or ſum of Twenty thouſand "pounds hereinbefore directed to be raiſed and paid to her ſhall "not be ſo raiſed; but the ſame and all intereſt in reſpect thereof "ſhall ſink into the general ſurplus or produce of my eſtates for "the benefit of the perſons reſpectively entitled thereto under "the truſts aforeſaid; and then alſo and in ſuch caſe my ſaid "truſtees and the ſurvivor of them, his executors, adminiſtrators "or aſſigns, ſhall ſtand poſſeſſed of and intereſted in all the ſtocks, "funds or ſecurities, purchaſed with the accumulation of my *Surrey* "and *Middleſex* eſtates before deviſed for the benefit of my ſaid "daughter *Caroline Bond Hopkins*, upon and to and for ſuch and "ſo many of the truſts, ends, intents and purpoſes, and proviſoes, hereinbefore expreſſed and declared reſpecting the ſtocks, "funds and ſecurities, ſo as aforeſaid to be purchaſed with the "produce of my real and perſonal eſtate, as ſhall be then exiſting, "undetermined, and capable of taking effect."

This will was written in the teſtator's own hand, very cloſe. All the ſums were in letters, not figures. The teſtator died ſoon afterwards. His daughter, who was his only legitimate iſſue, having attained the age of twenty-one, but being under twenty-four, married ——— *Philipps* with the conſent of the ſurviving guardians; upon which occaſion a ſettlement was made of the real eſtates and perſonal property, to which ſhe was entitled under her father's will. The teſtator's widow married —— *Fuller*.

The bill was filed by Mr. and Mrs. *Philipps*, praying the neceſſary accounts and directions; and that it might be declared, that the plaintiffs are entitled under the will to the ſum of 30,000*l.*

Another queſtion aroſe upon the diſpoſition of the reſidue: the plaintiffs, and the defendants Mr. and Mrs. *Fuller*, contending, that the intereſt and dividends only were given; and the capital was undiſpoſed of.

Mr. Grant and Mr. W. Agar for the plaintiffs—Upon the firſt queſtion the Court muſt adopt the principle, upon which *Melliſh* v. *Melliſh* (*a*) was decided, and adhere to the words of the will; which amount to a direct bequeſt of 30,000*l.* immediately following-

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(*a*) The preceding caſe.

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ing the direction to pay her 800*l.* a-year; though in another part of the will he ſuppoſes, he has given 20,000*l.*; which is not given. There is nothing in other parts of the will to preclude an intention to give his daughter 30,000*l.*; as he has done expreſsly. The Court cannot take away this bequeſt by inference and implication, not abſolutely neceſſary, but rather giving the plaintiffs a right to make a double claim, both to 30,000*l.* and 20,000*l.* The word "hereinafter" implies, that the legacy, to which it is applied, is in a diſtant part of the will: but this legacy of 30,000*l.* follows immediately; and the expreſſion "and alſo," which introduces it, imports addition. It is hardly poſſible to ſuppoſe, the teſtator could make ſuch a miſtake in the very next line; and it is alſo improbable from his having uſed letters inſtead of figures. There is not therefore enough to contradict this poſitive and expreſs bequeſt.

Mr. Romilly for the defendants Mr. and Mrs. Fuller, in the ſame intereſt with the plaintiffs upon the ſecond queſtion—This is an attempt to obtain the capital of the reſidue under a diſpoſition of the intereſt and dividends merely. He probably would have given the capital, if it had been ſuggeſted to him: but he has not done ſo. This caſe will be argued by analogy to a deviſe of the rents and profits of a real eſtate: but there is no authority to ſhew, that a diſpoſition of the intereſt of perſonal property will be a diſpoſition of the capital. The principle of the former caſe cannot be made by any reaſoning to apply to the latter; for when a teſtator gives the rents and profits of real eſtate, he may be ſaid to give the eſtate; the enjoyment of which conſiſts in the receipt of the rents and profits. That cannot be ſaid of a ſum of money. The receipt of the intereſt is not all the enjoyment of that property. The legatee may ſpend the money; and though the owner of a real eſtate may convert it into money, that power is very different from that of the owner of a ſum of money, which he may uſe, as he would the intereſt, or of a perſonal chattel. This is an imperfect diſpoſition. The teſtator intended to make a diſtribution of the whole of his property; but has failed in that. His widow and daughter claim all, that is not diſpoſed of, by the law; not under his intention, but contrary to it.

Mr. Piggott for the defendants claiming under the reſiduary clauſe was ſtopped by the Court.

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Maſter of the Rolls—My opinion is againſt the plaintiffs upon both points. I am of opinion, that there is a manifeſt inference, that the legacy of 30,000*l.* is a mere miſtake and ſubſtitution for 20,000*l.*; and alſo, that the reſiduary clauſe is ſufficient to carry the whole property.

A miſtake in a will cannot be corrected, or an omiſſion ſupplied, unleſs it clearly appears by fair inference from the whole will.

I do not depart from the principle of *Melliſh* v. *Melliſh*; *viz.* that a miſtake cannot be corrected, or an omiſſion ſupplied, unleſs it is perfectly clear, by fair inference from the whole will, that there is ſuch miſtake or omiſſion.

I have ſeen the original will; which is written by the teſtator himſelf; and it is very extraordinary, that all the principal legacies are in very large characters except this one of 30,000*l.* The firſt queſtion is, whether ſufficient appears upon the face of the will to prove, the teſtator did not give any other legacy to his daughter than 20,000*l.*? I admit, I am bound to give the words their uſual and accuſtomed import, or their technical ſenſe, if they have any, unleſs upon a peruſal of the whole will a contrary intention appears manifeſtly, and, I ſay, unavoidably. It is not immaterial to ſtate, that the will is ſo inaccurate, that though an intention to give a legacy to the Humane Society is expreſſed, no legacy is interpoſed; and conſequently no legacy to them can take place. It is very true, in giving the legacy of 30,000*l.* he uſes the words "*and alſo.*" Suppoſe the will had ſtopped after giving that legacy, and that there had been no diſpoſition in any other part of the will with regard to any other legacy, even then a very conſiderable argument would have ariſen to ſhew, that 30,000*l.* meant 20,000*l.*; for it appears to me, he thought, he had given his daughter a legacy of 2000*l*; for he gives the annual ſum of 800*l.* to her expreſsly as intereſt upon the legacy of 20,000*l.* "hereinafter directed to be paid to her." There is no ſuch direction. Then the queſtion would be, why ſuppoſe 30,000*l.* to be a miſtake more than 20,000*l.*? The argument upon that would have been, that 800*l.* *per annum* is not the intereſt, in any reaſonable way of calculating it, of 30,000*l.* It is the intereſt upon 20,000*l.* at the rate of 4 *per cent.* I ſhould have thought great argument would have ariſen, even if it had ſtood there: but when in a ſubſequent part of the will he directs, that in the event of the death of his daughter under the age of twenty-four and unmarried, till which period ſhe was to receive the annual ſum of 800*l.*, the legacy of 20,000*l.* "hereinbefore directed to be raiſed and paid to "her" ſhall not be ſo raiſed, but ſhall ſink into the reſidue; and there is no legacy of 20,000 *l.* but there is a legacy of 30,000 *l.* before directed to be raiſed and paid to her at the time, when the payment of the intereſt before given would ceaſe, *viz.* at her age of twenty-four or marriage with conſent, I cannot, with all the anxiety I feel to give every word its effect, declare, that I am not ſatisfied, that by 30,000 *l.* he meant only to refer to the legacy of 20,000 *l.*, the intereſt of which he has before given. The ſubſequent part of the will does by reference to the other demonſtrate to my ſatisfaction, that 30,000 *l.* is a mere miſtake for 20,000 *l.* The plaintiffs therefore are not entitled to any other legacy than 20,000 *l.*

If I am right in that conſtruction, which upon very full conſideration I think myſelf bound to hold, the next queſtion is, whether by the reſiduary clauſe an abſolute intereſt is given to the legatees, or only the uſe, the intereſt and dividends, that ſhould ariſe during their reſpective lives; the principal being undiſpoſed of? I admit, it is not enough to ſay, I ſuppoſe, he did not mean to die inteſtate. There muſt be enough to prove, not only that he did not intend, but that he did not die inteſtate. My conſtruction is, that as to the eſtates deviſed to his daughter, there is a revocation of that deviſe, if ſhe did not live to attain the age of twenty-four or marry with conſent of her guardians; and in that caſe thoſe eſtates are deviſed to his truſtees upon the ſame truſts as the other eſtates; and it is exactly as if they had been originally deviſed to the truſtees to be ſold. Upon the reſiduary clauſe it is ſaid, the legal import is to give nothing but the dividends and intereſt of the ſurplus for the reſpective lives of theſe four perſons; for there are words of ſeverance. I am not prepared to ſay, that I ever heard, that where a teſtator gives for ever and without limitation the dividends and intereſt to accrue upon the reſidue of his perſonal property, that would not carry the whole intereſt. If the words "for ever" were added, I ſuppoſe, it would not be contended, that it would not carry the principal alſo, though without the word "executors"; for there would be nobody, who could ever claim the capital; and if I was to reſt upon the firſt part of the clauſe only, I ſhould apprehend, that where the dividends and intereſt of the reſidue are given abſolutely to the truſtee and his heirs, upon truſt to pay the intereſt and dividends to *A.* from time to time without any limitation of duration, it would carry the

whole

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whole intereſt, even without the aid of the ſubſequent part of this clauſe directing the ſhares to be paid at the age of twenty-one, with benefit of ſurvivorſhip in caſe of the death of any of them before that age; from which I think, a fair inference ariſes. It is impoſſible to ſuppoſe ſuch an abſurdity, as would reſult from the contrary conſtruction. An abſurdity may be ſo great as to raiſe a neceſſary implication. A Judge muſt diveſt himſelf of common ſenſe to impute ſuch an abſurdity to a teſtator as to ſuppoſe, that he gives the intereſt to them for their reſpective lives only, and that if any one ſhall die under the age of twenty-one, then that ſhare given for life only ſhall ſurvive to the others; and ſo, if more than one die under that age; but if any of them ſhould live to attain twenty-one, in that caſe it ſhould not go over to the ſurvivors, but be undiſpoſed of. That part of the clauſe is perfectly ſatisfactory to ſhew, that he did intend to give them the abſolute intereſt. If they were to have only an intereſt for life, of what conſequence would their deaths before the age of twenty-one be? If they had it only for their lives, there would be no part or ſhare for the ſurvivor to have. It would be gone with their deaths. Their living to the age of twenty-one would have no effect. It is clear, he meant to give an intereſt, that would ſurvive; even independent of the circumſtance, that it is given as a reſidue; and it muſt always be remembered, that when the reſidue is given, every preſumption is to be made, that he did not intend to die inteſtate. Add to that the concluding part, that if three out of the four ſhall die during their minority, the ſurvivor is to be entitled "to the whole "reſidue and ſurplus aforeſaid." It is ſaid, thoſe words muſt be reſtrained to the whole ſurplus dividends: but that is not the uſual ſenſe.

I have read over this will with great attention; and no Judge is more deſirous of arming himſelf againſt any implication, that does not reſult from the fair conſtruction of the whole will, than I am: but upon the fair conſtruction of this will I am of opinion, that the plaintiff is not entitled to a legacy of 30,000 *l.*, but to one of 20,000 *l.*; which upon her marriage with conſent became veſted; and that the reſidue after payment of the debts, legacies, and annuities, veſted abſolutely in the plaintiff and the three other reſiduary legatees.

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Rolls,
July 5th,
12th, 18th.

A power of appointment not executed by a general diſpoſition by will.

Deviſe; on condition of paying 500*l.* in ſix months upon truſt to pay the intereſt to the deviſor's wife for life; and after her death the principal according to her appointment in writing with witneſſes, whether ſole or married, provided ſhe ſhall releaſe her dower within ſix months; and in caſe of her marriage without conſent of the truſtees, one moiety to go over: the wife, who took other intereſts under the will, died within the ſix months, not having married, nor releaſed dower: the 500*l.* did not veſt in her.

The Court will not interfere between repreſentatives by changing the nature of property in execution of a truſt, the object of which has failed.

John Slee by his will, dated the 17th of *March* 1792, deviſed to his wife an eſtate in fee; and gave her all his houſehold goods, furniture, and book debts, abſolutely. He deviſed a meſſuage called the *Swan* Inn, with the appurtenances thereto belonging, and other premiſes, to his brother *Samuel Slee*, his heirs and aſſigns for ever; provided he and they do and ſhall pay or cauſe to be paid unto *Jonathan Croft* and *John Slater* or their heirs the ſum of 500*l.* in ſix months after his deceaſe; and he thereby charged the *Swan* Inn and the premiſes thereto belonging with payment of the ſaid ſum of 500*l.*, upon truſt, that *Croft* and *Slater* or the ſurvivor of them, or the executors or adminiſtrators of ſuch ſurvivor, ſhall place out the ſum of 500*l.* or any part thereof upon any public or private ſecurity, and from time to time call in and place the ſame or any part thereof out again from time to time, as they ſhall think proper, and pay the intereſt or produce thereof every half year unto his wife *Betty Slee* for and during the term of her natural life; and from and after her deceaſe, as to, for, and concerning, ſaid principal ſum of 500*l.*, in truſt for ſuch perſon or perſons as ſaid *Betty Slee* ſhall by any deed or inſtrument in writing to be by her executed in the preſence of two or more credible witneſſes, and whether ſhe ſhall be ſole or married, give, limit, and appoint, the ſame; and he deſired and directed, that his ſaid wife ſhall within ſix months after his deceaſe releaſe her right of dower in the ſaid meſſuage, called the *Swan* Inn with the premiſes thereto belonging, ſubject to the payment of the ſaid ſum of 500*l.*; and in default thereof the ſaid bequeſt hereinbefore given to her ſhall ceaſe and be void; and he declared his will farther to be, that in caſe his ſaid wife ſhall marry without the conſent in writing of *Croft* and *Slater* firſt obtained, one moiety of the ſaid 500*l.* ſhall go and be paid to *Anthony Culverwell*, his executors and adminiſtrators. He gave all the reſidue of his perſonal eſtate to his wife; and he appointed *Croft* and *Slater* executors in truſt of his ſaid will.

The teſtator died ſoon afterwards without iſſue; leaving his brother *Samuel Slee* his heir at law; who entered upon the eſtates deviſed to him.

The

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The teſtator's widow by her will, dated the 9th of *September* 1792, atteſted by three witneſſes, gave and bequeathed to *Croft* and *Slater* " my executors hereinafter named all my money ſecurities " for money goods chattels eſtate and effects of what nature or " kind ſoever to hold to them their executors adminiſtrators and " aſſigns" upon truſt, that they ſhall as ſoon as convenient after her death ſell and diſpoſe of her houſehold goods and furniture, and call in and receive all ſuch debts, ſum or ſums of money, " as " ſhall be due or owing to me at the time of my death and place " the ſum of 280 *l.* part of the monies ariſing by ſale or diſpoſal " and the money ſo to be called in and received upon Government " or other good and ſufficient ſecurity" in truſt to receive the intereſt and dividends of the ſaid 280 *l.* and apply the intereſt, produce, and dividends, thereof to her mother *Joan Hagley* during the term of her natural life ; and from and after her deceaſe to pay, apply, and diſpoſe of, the intereſt and produce of the ſaid ſum of 280 *l.* in manner following to her nephews and nieces after mentioned (naming and deſcribing them) ; and when her ſaid nephews and nieces ſhall ſeverally and reſpectively attain the age of twenty-one, in truſt to pay to each of them the ſum of 20 *l.* ; and in caſe either of them ſhall die before attaining that age, in truſt to pay and transfer the ſhare of ſuch nephew or niece to and among his or her brothers and ſiſters, or brother and ſiſter, as ſhall live to attain twenty-one: provided, that ſuch as have or ſhall attain twenty-one during the life of the teſtatrix's mother ſhall not be entitled to his, her, or their, ſhares till after her deceaſe ; " and as to " all the reſt and reſidue of my money ſecurities for money goods " and chattels of what nature or kind ſoever both real and perſonal " I give deviſe and bequeath the ſame to the ſaid *Jonathan Croft* and " *John Slater* their executors and adminiſtrators" in truſt for certain perſons, equally to be divided between them ; and ſhe gave her mother 10 *l.*, to be paid in two months after her deceaſe ; and ſhe appointed *Croft* and *Slater* executors in truſt of her will.

The teſtatrix died within ſix months after the death of her huſband, not having married again : nor had ſhe releaſed her right to dower ; never having been applied to for that purpoſe. The bill was filed by her executors againſt *Samuel Slee* ; praying, that the will of *John Slee* may be eſtabliſhed, and the truſts carried into execution ; and that the ſum of 500 *l.* with intereſt from the end of

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ſix months from the death of the teſtator *John Slee* may be raiſed and paid to the plaintiffs.

It was alledged by the bill, that the property of the teſtatrix *Elizabeth Slee* was not ſufficient without the ſum of 500*l.* under her huſband's will to pay her debts and legacies. The defendant by his anſwer ſtated, that he believed, her other property was ſufficient. The anſwer was replied to: but no witneſſes were examined on either ſide.

The firſt point raiſed for the plaintiffs was, that the will of the teſtatrix amounted to an appointment of the ſum of 500*l.* under the power given by the will of her huſband. *Tomlinſon* v. *Dighton*, 1 *P. Will.* 149. *Standen* v. *Standen*, and *Langham* v. *Nenny*, (*ante*, vol. 2. 289. vol. 3. 467.) were cited: but this point was ſoon given up.

It was then contended, that the plaintiffs were entitled to have this ſum of 500*l.* raiſed, either as being the abſolute property of the teſtatrix under the will of her huſband, or as part of the general reſidue of his perſonal eſtate.

Mr. Lloyd and Mr. Romilly for the plaintiffs.—According to *Hales* v. *Margerum* (*ante*, vol. 3. 299.) this property may be conſidered at all events the property of Mrs. *Slee.* There is no limitation over in default of appointment. Therefore it is a gift abſolutely to her. A bequeſt of money to be at the diſpoſal of a perſon gives the abſolute intereſt: *Maſkelyne* v. *Maſkelyne*, *Amb.* 750. *Elton* v. *Shephard*, 1 *Bro. C. C.* 532. The Court will look into the whole will, and ſee the reaſon of giving the power. In this inſtance the reaſon was, that the teſtator had in contemplation the poſſibility of her marrying again. The defendant took an eſtate in fee with a conditional limitation to the truſtees, if he ſhould not pay this ſum of money in ſix months. As the deviſee was alſo heir at law, it is not a condition, but a conditional limitation. Where a legacy is charged on land, and the time of raiſing it is poſtponed on account of the age or any other circumſtance of the legatee, and the legatee dies before that time, the legacy lapſes, and falls into the eſtate: but where it is poſtponed, not from the circumſtances of the legatee, but for the convenience of the eſtate, the

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the money veſts as ſuch at the death of the teſtator, though to be raiſed at a future time. If it had been an abſolute gift, payable in ſix months, and ſhe had died within that time, it would have veſted without doubt. It is equally clear, that if it had been given to the wife for life, remainder abſolutely to another perſon, who ſurvived the teſtator a ſingle day, it would have veſted in the remainder-man at the ſame time that it veſted in the widow, though ſhe died within the ſix months. The delay being only for the convenience of the eſtate would make no difference. To prove this a veſted intereſt, if ſhe had married without conſent of the executors, and had died within ſix months after the death of the teſtator, it would have been a veſted intereſt by her marriage: one moiety would have paſſed to *Culverwell*; and the other half muſt alſo have been raiſed. The teſtator takes particular notice of the poſſibility of her marrying again; and his proviſion for that event ſhews the reaſon of giving her an intereſt for life. Theſe truſtees have a legal right to take poſſeſſion of the eſtate at law, and to hold it, till they raiſe the ſum of 500*l.* If that ſum was in the hands of the truſtees, the conſequence is clear, that the intereſt muſt have been paid to the widow for life; and if there is no farther diſpoſition, it would reſult to the perſonal eſtate of the teſtator. This ſum therefore ought to be conſidered as actually raiſed at the death of the teſtator; and if it was not ſpecifically the abſolute property of his widow, it muſt be part of his perſonal eſtate not diſpoſed of. *Tunſtall* v. *Bracken*, *Amb.* 167. *Hodgſon* v. *Rawſon*, 1 *Veſ.* 44. *Dawſon* v. *Killet*, 1 *Bro. C. C.* 119. where moſt of the authorities are collected.

Mr. Piggott for the defendant was proceeding to contend, that the clear import of the will contradicted the argument, that this ſum of 500 *l.* was given abſolutely to Mrs. *Slee*, but was ſtopped by the Maſter of the Rolls; who ſaid, he would look into it; and did not think, he ſhould have occaſion to trouble the Counſel for the defendant.

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Maſter of the Rolls.—The only queſtion is, whether under the circumſtances of theſe two wills this ſum of 500 *l.* is become raiſable for the purpoſe of being applied as part of the perſonal eſtate of Mrs. *Slee*, having become ſo as part of the perſonal eſtate of her huſband undiſpoſed of; for it was not with any confidence con-

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tended to have been ſpecifically appointed by the will of his widow. She was not called upon, nor did ſhe during the ſix months ſignify her intention to relinquiſh her dower: but during thoſe ſix months ſhe made her will, taking no notice whatſoever of her power of appointment, but diſpoſing of her property in general terms. She does not affect in any manner whatſoever to execute the power given to her to diſpoſe of this ſum of 500*l.* It is impoſſible to conſider, that ſhe has executed her power by this will; and it was very properly conceded by the plaintiffs, that it can never be conſidered as an appointment.

The next queſtion is, whether it was a veſted intereſt in her upon the death of her huſband; and ſeveral caſes were cited to prove, that under certain circumſtances a ſum of money to be raiſed within a certain time after the teſtator's death, though the party to be entitled to it dies before the time, at which it is to be raiſed, has been held veſted in the party, who would have been entitled to it, when that period arrived: but I do not apprehend, this caſe turns upon thoſe caſes at all. This cannot be conſidered part of the perſonal property of the wife under the diſpoſition by her huſband's will. It is not like the caſe of *Hales* v. *Margerum*, lately before me; in which I thought, the property, which was the ſubject of the power, was the abſolute property of the perſon, to whom it was given, qualified only with regard to her ſituation as a married woman; and that it was part of her perſonal eſtate as much as a married woman could have perſonal eſtate. This is a mere power of diſpoſing. If ſhe does not diſpoſe of this ſum, it ought not to be raiſed at all. As I am of opinion, ſhe has not diſpoſed of it, the conſequence is, there can be no purpoſe, for which it can be raiſed, but to convert it from land to money.

But it is contended, that, if it is not diſpoſed of under the power, ſtill by the will of the huſband it is converted into perſonal eſtate; and conſequently muſt now be taken, as the teſtator has given it; and therefore would be part of his perſonal eſtate undiſpoſed of; and ſhe would take it in that character. That was the only doubt, I have had; being clearly of opinion, that the will is not a due execution of the power. It muſt be admitted, that if ſhe had lived to the end of the ſix months, and had releaſed her dower, and thereby entitled herſelf to the 500*l.*, it muſt have been raiſed, and put out at intereſt; the dividends to be payable to

Mrs. *Slee* for life; then to be diſpoſed of according to the mode pointed out by the will of her huſband, in caſe ſhe had executed her power: but if ſhe died without executing it, it would be ſo much money raiſed by the will, and unapplied; and would not have gone to the heir, but would have remained part of the perſonal eſtate. But the queſtion is, whether for the mere purpoſe of raiſing this ſum without an object I am to vary it from the ſituation, in which I find it at the death of the teſtator. He has pointed out the only objects, for which he intended it to be raiſed. It is admitted, thoſe objects do not exiſt any longer; that ſhe has died without having executed her power; and if I do raiſe it, it will be for no purpoſe but to change the nature of it from land to money. The Court never will act for that purpoſe only.

Nicholls v. *Criſp* (*a*), 26th of *November* 1777, before Lord *Bathurſt*, is often quoted, but is not thoroughly underſtood, I believe. The teſtator directed, that all his real eſtate, whereſoever ſituate, might be ſold; and he charged the produce with certain legacies; and if the purchaſe-money ſhould amount to more than 3000 *l.*, he bequeathed the ſurplus to his natural daughter; who died before him. The bill was filed by the next of kin to have the eſtate ſold, and the ſurplus of the purchaſe-money, after paying the gacies, paid to the plaintiffs; and it was argued, that the teſtator had ordered the eſtate at all events to be converted into money, as it muſt be for the purpoſe of paying the legacies; and that the ſurplus would belong to the next of kin: but Lord *Bathurſt* was very clearly of opinion, that, the object being to convert the eſtate merely for the purpoſe of paying legacies to a limited amount, and by the death of the teſtator's natural daughter, to whom the reſidue of the purchaſe-money was given, no other object remaining, if the heir would pay the legacies, the eſtate ſhould not be ſold. According to my note Lord *Bathurſt* made that decree without any difficulty, notwithſtanding what is ſaid in *Ambler*.

In this caſe there is no object to be anſwered. The queſtion then is, whether I am to make a decree upon this bill merely for the purpoſe of turning this real eſtate into money. Every rule, that has prevailed upon this ſubject, militates againſt that. It is not according to the courſe of the court to act for the mere purpoſe of converting one ſpecies of property to another.

(*a*) *Amb.* 769.

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Under the authority of the caſe, I have mentioned, with others I am of opinion, that under the circumſtances of this caſe this ſum of 500*l.* is not to be raiſed. The conſequence is, the bill muſt be diſmiſſed; but without coſts (*a*).

(*a*) See *Chitty* v. *Parker, ante*, vol. 2. 271.; the caſes there referred to, and *Halliday* v. *Hudſon, ante*, vol. 3. 210.

July 24th.

SKEFFINGTON *v.* ———.

Subpœna not neceſſary to an amended bill.

After anſwer the bill was amended. The defendant being abroad, a motion had been made on the part of the plaintiff, as of courſe, that ſervice of the *Subpœna* on the defendant's clerk in Court ſhould be deemed good ſervice.

The *Regiſter* declined drawing up the order.

Mr. Thomſon for the motion diſtinguiſhed this from caſes, in which, exceptions to the anſwer being allowed, and the bill amended, the uſual order is, that the amendments and exceptions ſhall be anſwered together. In that caſe a new *Subpœna* is not neceſſary; a complete anſwer not being put in. In this inſtance the anſwer was ſufficient.

Lord Chancellor ſaid, he underſtood from the *Regiſter*, that there is no occaſion for a *Subpœna* upon an amended bill.

An inquiry into the practice was directed; upon which it appeared, that the practice was not to ſerve a new *Subpœna* upon an amended bill. The order therefore was not drawn up.

July 24th.

LADY SHAFTSBURY *v.* ARROWSMITH.

An heir at law has no equity except to remove incumbrances in the way of his legal right: he cannot call for an inſpection of deeds in the poſſeſſion of the deviſees.

Bill by heir in tail againſt deviſees:, on motion an inſpection was ordered of all deeds of ſettlement, admitted to be in the poſſeſſion of the defendants, creating eſtates in tail general: but no farther.

Sir *John Webb* by his will gave all his eſtates to *Arrowſmith* and *Butler* in truſt.

After a ſuit had been inſtituted for the purpoſe of eſtabliſhing the will, this bill was filed againſt the truſtees; ſtating, that the plaintiff is heir at law and cuſtomary heir of the teſtator. The bill alſo ſtated, that the plaintiff is heir of the body of the teſtator; that ſhe is totally ignorant, whether ſhe is or is not entitled to any and which of the eſtates deviſed; that the eſtates are in the poſſeſſion of the defendants; that there were ſeveral ſettlements; and that it is impoſſible for the heir to know her title without an inſpection of the deeds. The bill therefore prayed, that the defendants may be decreed to produce and ſhew to the plaintiff all the ſeveral title-deeds and writings, which ſhall appear to be in their poſſeſſion; and, if it ſhall appear, that the teſtator was not ſeiſed in fee, or if any of the eſtates were copyhold not duly ſurrendered to the uſe of the will, or if the will was not duly executed, or if it ſhall not appear, that the teſtator was of ſound mind at the time of execution, or if any fraud was practiſed, then that the ſeveral title-deeds, ſettlements, and inſtruments in writing, relating to ſuch of the ſaid eſtates as the plaintiff ſhall appear entitled to either as heir at law, cuſtomary heir, or heir of the body, may be decreed to be delivered up to the plaintiff.

The defendants by way of ſchedule to their anſwer ſet forth an abſtract of ſeveral ſettlements in their poſſeſſion.

A motion was made on the part of the plaintiff for an order, that the deeds might be produced for her inſpection; and that they might be depoſited in the Maſter's office.

Mr. Manſfield, Mr. Sutton and Mr. Cox, for the motion.—In *Bettiſon* v. *Farringdon*, 3 *P. Will.* 363. the party was not heir, except as to an Honor deſcending upon him; and it was admitted there, that it would be done at the hearing. So in the *Earl of Suffolk* v. *Howard*, 2 *P. Will.* 176. which was a bill on the part of the heir, it is plainly implied, that the queſtion was not, whether there was to be a production of the deeds, but whether it could be done upon motion, or was to wait for the decree. The heir without an inſpection cannot tell, what is the title of the anceſtor; whether in fee, or in tail. He muſt aſſume the title of the anceſtor to be a ſeiſin in fee. I believe, Lord *Hardwicke* conſidered the rule eſtabliſhed, that the heir has a right upon filing a bill againſt the deviſee to have the title-deeds produced; and Lord *Manſfield* frequently ſpoke of this right in the heir. *Burton* v. *Neville* before Lord *Thurlow* is directly againſt the caſes, I have mentioned; in the laſt of which not only an inſpection of the deeds creating an intail or making a tenant to the *Præcipe* was granted, but of all deeds and writings.

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1798.

Lady Shaftsbury *v.* Arrowsmith.

The claim as heir in tail is exactly according to the caſes in *Peer Williams*. Lord *Thurlow* thought the heir entitled to the deeds creating the intail and the prior title-deeds.

In this caſe ſix or ſeven family ſettlements of theſe eſtates have been made from time to time. They are ſtated in the abſtract; but the plaintiff has not ſeen the particulars of them nor the deeds making tenants to the *Præcipe*. She has a right to all thoſe. The Court always indulges the heir with an opportunity of knowing, how he is diſinherited. The heir is always under this difficulty; that not having the poſſeſſion of the deeds he cannot point out thoſe, under which he has an intereſt. Is there any other mode of aſcertaining that than by the production of all? If it is once aſcertained, that the deviſor was ſeiſed in fee, certainly the heir can only aſk, whether the will is effectual: but in this caſe a title in tail is aſſerted.

Attorney General, *Solicitor General and Mr. Thomſon*, *for the defendants.*—This application involves a propoſition of great conſequence: ſo much ſo, that perhaps the court would heſitate to grant it on motion. The bill is very peculiar; for firſt it conſiders the plaintiff as heir at law: then ſtates a poſſibility, that ſhe may be heir in tail; and in that mixed character ſhe calls for the relief, to which ſhe may be entitled, if ſhe is proved heir in tail: but ſhe does not aſſert that poſitively, or pray a diſcovery as to that. As heir at law ſhe might bring an ejectment; and if there was any difficulty in her way, ſhe would be entitled to remove it, and to have a diſcovery. The bill therefore is not properly framed in that character. As heir in tail ſhe ſtates no intail. She might ſay, as they have got the title-deeds, ſhe has a right to diſcover, whether or not there was an intail, under which ſhe could claim: they might anſwer, that they could not find it; or they might refer to it ſo as to entitle her to the production: but the bill is not framed with that view. It is only a looſe allegation, that ſhe does not know but that ſhe may be entitled in tail. It is neceſſary to have a degree of certainty in the bill, that the defendants may know what defence to make. Suppoſe, an intail was ſtated, the defendants might plead the deeds of the recovery: but if the intail is not diſtinctly ſtated, they are ouſted of that defence. The plaintiff merely ſtates in general terms, that ſhe is heir at law; and alſo, that ſhe is heir in tail, without ſetting forth any deed or referring to any ſpecific act to eſtabliſh that title. As the heir is a female,

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Lady Shaftsbury v. Arrowsmith.

It might happen, that if ſhe could ſhew an intail, it might not give her a title, but without giving any intereſt to her it might operate directly againſt the deviſees of her anceſtor. In the caſes cited a ſpecial deed of intail is ſtated. In *Dormer* v. *Forteſcue*, 2 *Atk.* 282. 3 *Atk.* 124. and *Pincke* v. *Thornycroft*, before your Lordſhip, Lord *Thurlow*, and the Houſe of Lords (*a*), the title was as heir general; and it was held, that though the heir has an equity beyond any one elſe, yet he muſt admit, that the poſſeſſion of his anceſtor is *primâ facie* evidence of ſeiſin in fee; and he muſt frame his bill ſo as to ſatisfy the Court, that if he brings an ejectment upon that ſort of evidence, that his anceſtor was ſeiſed in fee, he may meet with ſome impediment in the application of that evidence at law, which in Equity he has a right to remove in order to try it at law. It was pretended in that caſe, that a mortgage term would be ſet up againſt the ejectment.

The heir in tail is in a different ſituation. He has a right to inſpect and be enabled to produce the deed creating the intail: but then the moment he proves himſelf heir of the body of the perſon laſt ſeiſed, he puts it upon the other party to meet him at law upon that title. The heir in tail has no other right than to ſee the deed creating the intail and the prior deeds, but not to call for the deeds, by which that intail is defeated; which is the point to be tried at law. That was the principle of *Burton* v. *Neville.* In *Bettiſon* v. *Farringdon* it was an order of courſe to ſet forth the deeds referred to in the anſwer. In the other caſe in *Peer Williams* the party could not make *Profert* of the deed in a Court of law; and he had a right to have that deed produced by the decree of a Court of Equity. The Court ſaid, that as the other party informed the Court, how the intail had been barred, he muſt ſhew the deed, that the Court may determine, whether it has the conſequence, they attribute to it: but they might have refuſed to produce any except the deed of intail and the prior deeds. In a late caſe in the court of Exchequer the bill was filed by an heir in tail, praying a diſcovery of all the deeds. A demurrer was put in to ſo much of the bill as related to any deeds ſubſequent to the deed creating the eſtate-tail; and the demurrer was allowed. *Stapleton* v. *Sherrard* and *Sherbone* v. *Clerk*, 1 *Vern.* 212, 273, perfectly warrant that deciſion. A perſon deſiring the production of deeds

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(*a*) 1 *Bro. C. C.* 289. *Cruiſe* 174.

muſt ſhew a title to that production. For that purpoſe he muſt ſhew ſome claim under the deed, unleſs the object is to ſet aſide the deed as fraudulent; the claim being paramount the deed. Such a general right in the heir would be very miſchievous. There is no caſe, in which a looſe bill like this has had that effect. If there are circumſtances, if a term or a mortgage is ſtated to be in the way, he has a right to a diſcovery as to that, but to that only. The defendant muſt ſtate by his anſwer, whether there are ſuch incumbrances, or not. The deed of intail is diſtinctly ſtated in the two caſes in *Peer Williams*. In one there is a *Quære* by the Reporter, whether a bare reference to a deed will make it part of the anſwer. In the other the Court appears to have gone rather too far upon the ground, that it was a hard caſe, and on account of the complete diſinheriſon of the Earl; who had not the means of purſuing the ſuit. It is not noticed in later caſes as having been argued; and it ought not to be much cited.

Reply.—The plaintiff ſays, ſhe is heir in tail; and if any intails were created, which are not barred, ſhe is entitled under them. What more can ſhe ſay, when all the deeds are in the hands of the defendants; which is admitted? What more can ſhe ſtate than that ſhe is ignorant, whether the deviſor was entitled in fee, and had power to diſpoſe? The anſwer refers to a great many deeds without ſtating the contents: but apparently there are many ſettlements creating intails. It is admitted that the plaintiff has a right to the inſpection of deeds creating intails: as to any thing elſe, *Burton* v. *Neville* is an authority againſt it: but it ſtands in oppoſition to the caſes in *Peer Williams*. It is true, in both thoſe caſes an intail is ſtated: but the order appears to go far beyond the production of thoſe deeds; and goes clearly to the deed creating the tenant to the *Præcipe*; and the reſt only refers to the time, when the production is to take place.

Lord CHANCELLOR.—It would be a very delicate point to order a general inſpection into all deeds and ſettlements on behalf of a perſon claiming in the mere character of heir at law. I do not find any ſpark of Equity, upon which that application could be made to this Court and ſupported. The title of the heir is a plain one; and it is a legal title. All the family-deeds together would not make his title better or worſe. If he cannot ſet aſide the will, he has nothing to do with the deeds. He muſt make out his title at law, unleſs there are incumbrances ſtanding in the way, which this Court would remove in order to his aſſerting his legal right. There the principle of Equity interferes. The caſes in *Peer Williams* are thoſe of an heir in tail. A will is no anſwer to an heir in tail: a will eſtabliſhed is an anſwer to an heir at law. An heir in tail has beyond the general right ſuch an intereſt in the deed creating the intail, that the Court, as againſt the perſon holding back that deed, would compel the production of it. His right alſo is upon a very plain ground: to remove an impediment preventing the trial of a legal right. In the two particular caſes cited, (I do not go quite along with the reaſoning in either of them,) the Court did no more than what according to the ſtate of the caſe was perfectly innocent, and led to no miſchievous conſequence: for the production of the deed creating the intail, where the party could not get at it without the aid of this Court, I have already ſtated, it is in the power of the Court to order: as to what more was done, he being tenant in tail, and that admitted, the Court by enabling him to look at the deed to make the tenant to the *Præcipe* only put him in the ſituation, he would be in at law upon an ejectment. Where the tenant in tail has poſſeſſion of the deed, that makes the intail, and can prove the heirſhip in tail, it is put to them to produce the recovery. All the proceedings of neceſſity appear upon the trial, and muſt be brought forth. They cannot ſet out the judgment in the recovery, but muſt ſet out the whole proceedings. I remember a very long title upon a ſpecial verdict. The conſequence was, that it was enormouſly ſwelled by ſetting out one or two recoveries. A propoſition was made to the Court, whether it would not be better to ſtate the fact, that the recovery was ſuffered: but upon conſideration the Court thought it quite neceſſary to ſhew upon the Record, that it was well ſuffered. The Court therefore in thoſe caſes gave him no diſcovery, that in the courſe of his legal purſuit he would not come at; and the only advantage was to give him a little time to conſider, whether it would be worth his while to go on to proſecute his right at law. I rather imagine (it is a bold conjecture upon *Peer Williams*'s Report) that "at the hearing" means at the trial. There is no hearing upon a mere bill of diſcovery. Permitting a general ſweeping ſurvey into all the deeds of the family would be attended with very great danger and miſchief; and where the perſon claims as heir of the body, it has been very properly ſtated, that it may ſhew a title in another perſon, if the intail is not well barred. It may ſet up a title, not to

Upon an ejectment by an heir in tail the defendants cannot reſt upon the judgment in the recovery: but all the proceedings muſt appear upon the Record.

to the benefit of Lady *Shaftſbury*, but to the injury of the deviſees; indulging a ſpeculation to the prejudice of parties, whoſe intereſt this Court has no right to invade.

I apprehend, they have no objection, that all the deeds purporting to be deeds of ſettlement creating intails ſhall be produced for inſpection: otherwiſe it muſt go on to pointing interrogatories and aſking for an anſwer. The defendant *Arrowſmith* muſt give himſelf the trouble of inſpecting the deeds, and anſwering upon oath, whether they create an intail, or not. Wherever you find a deed of intail, it would be very idle not to produce it, and alſo the deed, which deſtroys the intail: it would be no breach of duty in the truſtee to give that qualified communication of the deeds: but rather the contrary. The plaintiff has a right to an anſwer to this queſtion: are there any deeds, that contain a limitation in tail general?

As to the other part of the motion, it would be very proper to make an order for the depoſit of the deeds in the other cauſe.

The Order pronounced was, that the defendants ſhall give inſpection of all deeds of ſettlement, ſet out in the ſchedule, creating eſtates in tail general.

Rolls, *May* 7th.
Lincoln's-Inn Hall, *July* 24th.

An executor in *India* paſſing his accounts in this court is entitled to the commiſſion upon the receipts or payments according to the practice in *India*.

CHETHAM v. LORD AUDLEY.

POOLE v. LARKINS.

THE firſt of theſe cauſes aroſe upon the following caſe:

Joſeph Moorhouſe died in the *Eaſt Indies* in 1789; having by his will, after ſome pecuniary legacies, given all the reſidue of his eſtate to his wife; and he appointed *Joſias Duprie Porcher*, *Edward Boiſdaune*, *George Hall*, ſince deceaſed, and Mrs. *Moorhouſe*, his executors in *India*, and *Thomas Chetham*, *John Strode*, *Robert Speediman*, ſince deceaſed, and Mrs. *Moorhouſe*, his executors in *England*.

Upon the marriage of Lord *Audley* and Mrs. *Moorhouſe* the reſiduary eſtate of the teſtator was aſſigned to truſtees, upon truſt as to one third for Lady *Audley*; and as to the other two thirds, upon truſt to pay the income thereof to Lady *Audley* for her ſeparate uſe during her life; and as to the capital of ſuch two-thirds, in truſt after the deceaſe of Lady *Audley* for her child or children by Lord *Audley*; and in default of ſuch iſſue, upon other truſts.

The will was proved by all the executors in *India*; and by *Chetham*, *Strode*, and Lady *Audley*, in *England*. A cauſe was inſtituted for the adminiſtration of the eſtate of the teſtator; and by the Decree made on the 26th of *July* 1792 the Maſter of the *Rolls* directed the uſual accounts; and declared, that the reſidue belonged to Lady *Audley* and to the truſtees in her marriage ſettlement; and an inquiry was directed as to the truſts of the ſettlement. On the 6th of *Auguſt* 1794 a ſeparate Report was made of the proceedings under that Decree.

The defendant *Joſias Dupre Porcher* was in *India* at the time the Decree was made. Upon his return to *England* a ſupplemental bill was filed againſt him. By his anſwer he ſubmitted to have an account of the teſtator's eſtate taken as againſt him; and by the Decree made in the ſupplemental Cauſe on the 12th of *December* 1796 the Maſter of the *Rolls* ordered, that the Decree and account ſhould be carried on againſt the ſaid defendant.

The Maſter made his general report, dated the 27th of *July* 1797, ſtating a balance of 729*l.* 13*s.* 7*d.* due to the defendant *Porcher* from the teſtator's perſonal eſtate; and that the ſaid defendant claimed to be allowed the ſum of 1022*l.* 2*s.* 2*d.* as and for commiſſion at the rate of 5 *per cent.* upon the ſeveral and reſpective payments made by him in *India*, on account of the eſtate of the teſtator; and that though it appeared by affidavits laid before him in ſupport of ſuch claim, that ſuch allowance had been made to executors by the Courts of Law and Equity in the *Eaſt Indies*, yet, inaſmuch as he knew of no inſtance of ſuch an allowance having been made to an executor upon paſſing his accounts in this Court, he had therefore not thought fit to allow the ſame without a ſpecial order.

An exception was taken to the Report for not allowing the claim of commiſſion.

The other cauſe came before the Court upon an exception taken on the ſame point.

The point was argued at the *Rolls*; and evidence was read of the practice in *India*. Sir *Elijah Impey* and other witneſſes proved, that it had been uſual to make this allowance to an executor, who had not a legacy. It was alſo in evidence, that the adminiſtration in *India* was very beneficial to the reſiduary legatée.

The Maſter of the *Rolls* having taken ſome time to conſider directed both cauſes to be ſet down for judgment.

May 7th. *Maſter of the Rolls.*—I muſt hold, that the commiſſion is due. It is a very material point; and I am ſorry to be obliged to decide it, but I have found it univerſally allowed, whenever claimed; and between party and party it has never been quarrelled with, when they came to ſettle their accounts. The exceptions therefore muſt be allowed in both cauſes; and it muſt be referred back to the Maſter.

It is a matter of very conſiderable conſequence; and it is very well worth while to take the opinion of the *Lord Chancellor* upon it.

July 24th. The point was brought before the *Lord Chancellor* upon an appeal from the order made by the Maſter of the *Rolls* in the cauſe of *Chetham* v. *Lord Audley*.

Mr. Graham for the appellants.—However reaſonable this practice may appear, and however it may tend to expedite the buſineſs and benefit the eſtates of perſons dying in *India*, yet there can be no poſitive law for it; and the acquieſcence in particular inſtances cannot be the foundation of any precedent in the courſe of practice in this Court; which muſt look to the general principle, that this Court will not allow an executor to take any profit for the execution of the truſt repoſed in him. A bad uſe may be made of it. To ſecure a large commiſſion, the executor may make payments, and neglect to get in the property; as he may charge the commiſſion either upon the payments or the receipts.

Mr. Pigott and Mr. Stanley for the executor.—This queſtion was argued in both cauſes very fully; and the Maſter of the *Rolls* converſed upon it with Sir *Elijah Impey*. The only queſtion is, whether, where a perſon is domiciled in *India*, makes a will there, and appoints an executor in *India*, who proves the will there, and collects the property, that executor is not to be allowed what the conſtant courſe of the practice of that country allows him; and whether it is to depend upon the accident of his coming and accounting here. The caſe would be the ſame upon any foreign adminiſtration. The queſtion would be as to the allowance, to which the executor would be entitled according to the law of that foreign country. The Maſter of the *Rolls* obſerved upon the beneficial effect of this practice, and upon the circumſtances of perſons dying in *India*, deprived of the preſence of their relations. The accounts are conſtantly tranſmitted to the *India* Houſe. In every caſe, in which the executor has not a legacy for his care and trouble, this allowance is made. Though the account was paſſed here, it is wholly an *Indian* account. If this allowance was not made, the effects of perſons dying in *India* would not be collected.

Reply.—The caſe of a foreign adminiſtration does not apply to this. The queſtion here relates to parties governed by the laws of this country, or by local laws ſubject to the regulations, under which they are made. It has been done by acquieſcence: but that cannot eſtabliſh a general rule; and would not govern the caſe of a married woman or of creditors.

Lord CHANCELLOR.—I rather incline to allow this. I think, the appointment of an executor in *India*, no legacy being given to him, is the appointment of an agent for the management of the eſtate. They give them the character of executor. There would be no poſſibility of getting the buſineſs done at all without this allowance; and if the executors in *England* were to get a perſon to do the buſineſs in *India*, they could not get it done ſo cheap.

Affirm the order.

The *Attorney General* ſaid, this commiſſion had been allowed at the *Cockpit*.

Rolls,
July 17th,
18th, 24th.

HOLFORD *v.* WOOD.

Executor having ſpecific bequeſts by will and codicil held a truſtee for the next of kin as to the reſidue undiſpoſed of.

A will reſtrained in point of extent to a partial diſpoſition by a particular enumeration and a reference to other inſtruments, notwithſtanding the general words "perſonal eſtate."

Specific diſpoſition by will ſubject to annuities and legacies held auxiliary only: the general perſonal eſtate to be applied in the firſt inſtance.

Two annuities of equal amount in the ſame will to the ſame perſon: held not accumulative.

William Ewer dying in 1789 by his will and a codicil, after giving a legacy of 500 guineas to Dame *Elizabeth Wood*, and five guineas to her huſband Sir *Francis Wood*, and other legacies, bequeathed the reſidue of his perſonal eſtate to his brother *Thomas Ewer* and *Thomas Torr*, to be laid out in Government ſecurities or Bank Stock; the intereſt to be paid to his ſaid brother for life; and after the deceaſe of his ſaid brother he gave 2000 *l.* Bank Stock to *Cropley Aſhley*, and the intereſt of the remainder of his perſonal eſtate to Dame *Elizabeth Wood* for her life; and after her deceaſe he gave the whole to the ſaid *Cropley Aſhley*; and he appointed his brother and *Thomas Torr* executors.

Thomas Ewer by his will, dated the 22d of *December* 1789, after giving ſeveral legacies and annuities bequeathed all the reſidue of his eſtate and effects to the ſaid *Thomas Torr* and *Francis Grojan* and the ſurvivor, his executors and adminiſtrators, in truſt to pay the intereſt and produce thereof during the joint lives of the ſaid Dame *Elizabeth Wood* and her huſband Sir *Francis Wood* unto Dame *Elizabeth Wood* for her ſeparate uſe; and if ſhe ſhould happen to ſurvive her ſaid huſband, upon truſt after his deceaſe to aſſign and transfer the principal or capital thereof unto her for her own uſe and benefit: but if ſhe ſhould die in his life, then the truſtees were to ſtand poſſeſſed of the ſaid reſidue of the teſtator's perſonal eſtate in truſt for the ſaid *Cropley Aſhley*; and he appointed his ſaid truſtees executors.

By indentures, dated the 25th of *March* 1790, executed ſoon after the death of *Thomas Ewer* and during the life of Sir *Francis Wood*, reciting the will and codicil of *William Ewer* and his death, and that *Thomas Ewer* had ſince died, and that part of the reſidue of the perſonal eſtate of *William Ewer* conſiſted of a piece of ground with the appurtenances ſituate at *Richmond* in the county of *Surrey*; which was occupied by the ſaid *William Ewer*, and uſed as a garden, and had by a certain indenture therein mentioned been aſſigned to him for the remainder of the term of 50 years, and had been valued at 50 *l.*; and that other part of the ſaid reſidue conſiſted of houſehold goods and furniture, pictures, china, a violin and caſe, a piano-forte, and other particulars therein mentioned, which had been valued at 668*l.* 7*s.*; and that the ſaid *Cropley Aſhley* having conſented to relinquiſh to the ſaid Dame *Elizabeth Wood* for her ſole and ſeparate uſe the ſaid piece of ground and the ſaid houſehold goods and other effects had requeſted *Thomas Torr* to aſſign the ſame to *William Godfrey*, in truſt, as thereinafter mentioned; and that *Thomas Torr* had accordingly by a deed poll of equal date aſſigned the ſaid piece of ground to *Godfrey*; it was witneſſed, that *Thomas Torr* and *Cropley Aſhley* aſſigned all the ſaid houſehold goods and furniture and other effects to the ſaid *William Godfrey*, in truſt for the ſole and ſeparate uſe of the ſaid Dame *Elizabeth Wood*, and to be held, uſed, enjoyed, aſſigned or diſpoſed of, as ſhe (notwithſtanding her coverture) ſhould appoint; and for want of ſuch appointment, in truſt for her, the ſaid Dame *Elizabeth Wood*, her executors, adminiſtrators and aſſigns.

By another indenture of the ſame date, reciting the will of *Thomas Ewer* and his death, and that part of the reſidue of the perſonal eſtate of the ſaid *Thomas Ewer* conſiſted of a leaſehold meſſuage in *Upper Brook Street*, held for a term of ten years at the yearly rent of 90*l.*, which leaſe had been valued at 5*s.*, and that other part thereof conſiſted of houſehold goods and furniture valued at 122*l.*, the ſaid leaſehold meſſuage and the ſaid other property were aſſigned to the ſaid *William Godfrey* in like manner, in truſt for the ſeparate uſe of the ſaid Dame *Elizabeth Wood*, and to be diſpoſed of, as ſhe ſhould appoint; and in default of ſuch appointment, in truſt for her, her executors, adminiſtrators and aſſigns.

Sir *Francis* and Lady *Wood* upon the 31ſt of *May* 1790 duly ſurrendered to the Lady of the manor of *Richmond* otherwiſe *Weſt-Sheene* in the county of *Surry* according to the cuſtom of the ſaid manor all the copyhold or cuſtomary meſſuages, lands, tenements and hereditaments, late of the ſaid *William Ewer* and *Thomas Ewer* or either of them, with their appurtenances (to which the ſaid Dame *Elizabeth Wood* had that day been admitted as the niece and heir at law of the ſaid *William* and *Thomas Ewer* reſpectively) to the uſe of ſuch perſon or perſons and for ſuch eſtates and intereſts, for ſuch ends, intents and purpoſes, and charged and chargeable with ſuch ſum or ſums of money, annual or in groſs, and in ſuch manner and form, with or without power of revocation, as ſhe, the ſaid Dame *Elizabeth Wood*, notwithſtanding her coverture, and

1798. HOLFORD *v.* WOOD. whether married or ſole, by any deed or writing or by her laſt will or any writing purporting to be her laſt will ſhould give, grant, deviſe or appoint, the ſame; and for want of ſuch appointment to the uſe of the ſaid Dame *Elizabeth Wood*, her heirs and aſſigns for ever.

Sir *Francis Wood* died in *July* 1795.

Lady *Wood* being ſeiſed and poſſeſſed of the ſaid copyhold tenements and of ſome of the perſonal eſtate of *William Ewer*, which had been aſſigned to her, as aforeſaid, and alſo of a reverſionary intereſt in 81*l.* 14*s.* 8*d.* Bank Long Annuities, ſtanding in the names of truſtees, being the ſum inſured upon a houſe, that had been burnt down, the truſts whereof had been declared by a deed, executed in the life of Sir *Francis Wood*, to be for the benefit of *Suſannah Ewer* for her life, and after her deceaſe for Sir *Francis Wood* and Dame *Elizabeth Wood*, their executors, adminiſtrators and aſſigns, according to their intereſts in the ſaid houſe; and being alſo poſſeſſed of other perſonal eſtate, comprehending among other particulars money in the public funds, part of the reſidue of the perſonal eſtate of *Thomas Ewer*, bequeathed to her by his will, made her will, as follows:

"This is the laſt will and teſtament of me Dame *Elizabeth Wood* "widow of Sir *Francis Wood* of *Lower Groſvenor-Street* in the "county of *Middleſex* Baronet and only child and heir at law of "*Anthony Ewer* late of *Queen-Square Weſtminſter* in the ſaid county "of *Middleſex* Eſquire deceaſed All the copyhold or cuſtomary "meſſuages lands and hereditaments late of *William Ewer* and "*Thomas Ewer* Eſquires deceaſed or either of them with their "and every of their appurtenances ſituate within or holden of the "manor of *Richmond* otherwiſe *Weſt-Sheene* in the county of "*Surry* to which I had been admitted as niece and heir at law "of the *William Ewer* and *Thomas Ewer* reſpectively were duly "ſurrendered to the uſe of ſuch perſon or perſons to and for "ſuch eſtates and intereſts and for ſuch edns intents and purpoſes and chargeble and charged with ſuch ſum or ſums of "money either annul or in groſs and in ſuch manners and form "as the ſaid Dame *Elizabeth Wood* notwithſtanding any coverture "by any deed or writing purporting to be my laſt will and teſtament ſhould give grant deviſe limit or appoint the ſame And "whereas by virtue of certain leaſehold hereditaments houſehold

" goods furniture and perſonal eſtate late belonging to the ſaid " *William Ewer* and *Thomas Ewer* reſpectively were aſſigned to " I do by this preſent writing give deviſe limit and appoint the " ſaid copyhold or cuſtomary meſſuages lands tenements and hereditaments and alſo the ſaid leaſehold hereditaments houſehold " goods furniture and perſonal eſtate unto the ſaid Sir *Francis* " *Lindley Wood* his heirs executors adminiſtrators and aſſigns for " his and their own proper uſe and benefit ſubject only to the " payment of the following annuities and legacies (that is to " ſay) I give to *Charles Richardſon* of his Majeſty's ſhip *Circe* " a legacy of 500*l.* and to *Thomas Newman* I give an annuity of " 30*l.* for his life payable quarterly at the uſual quarter-days the " the firſt payment to be made on ſuch of the ſame days as ſhall " firſt happen after my death To *Caroline Wood* daughter of the " late Captain *Charles Wood* of *Bowling-Hall* I give my diamond " ear-rings To *Thomas Torr* of the Bank I give a legacy of 50*l.* " To my ſervant I give all my wearing-apparel To *Elizabeth* " *Mole* I give an annuity of 10*l.* a-year for her life and to each " of the women ſervants who are living with me at the time of " my death I give a legacy of 20*l.* and to each of the men ſervants who are living with me at the time of my death I give a " legacy of 20*l.* Theſe legacies to be ſeverally paid at the end of " three months next after my death I give to *Thomas Newman* the " butler 30*l.* a-year for his life And I do nominate and appoint " the ſaid Sir *Francis Lindley Wood* to be ſole executor of this my " will and teſtament whereof the ſaid Dame *Elizabeth Wood* have " to this preſent writing which I declare to be my laſt will and " teſtament ſet my hand and ſeal this 28th day of *Auguſt* 1795 in " the 34th year of his reign of the King of *Great Britain France* " and *Ireland* King Defender of the Faith and ſo forth and in the " year of our Lord 1795 I give to *Joſeph Robinſon* 10*l.* a-year " for his life."

This will was ſigned by the teſtatrix, and atteſted by three witneſſes; and the whole of it was written in her own hand.

The following codicil was added, written upon the ſame paper, and in the hand-writing of the teſtatrix, but without date:

"I give to Sir *Francis Lindley Wood* 81*l.* a-year Long Annuities " 14*s.* 8*d.* for the life of Mrs. *Ewer* at her death at the diſpoſal " of Lady *Wood* which I give to Sir *Francis Lindley Wood* alſo the "houſehold goods furniture plate books and linen to his heirs "adminiſtrators and aſſigns at the houſe in *Lower Groſvenor-Street* "which is out in 1800."

The teſtatrix died in 1796. The bill was filed by the ſole next of kin; and four queſtions aroſe:

1ſt: Whether by the diſpoſition in favor of the executor he was a truſtee as to the reſidue for the next of kin.

2dly: As to the extent of the diſpoſition to the executor; whether it comprehended all the property of the teſtatrix derived from the *Ewers*, or by reference to the aſſignments ſo much only as ſhe was poſſeſſed of under them;

3dly: If the diſpoſition to the executor was reſtrained to what paſſed under the aſſignments, whether he took that property liable to the legacies and annuities in the firſt inſtance, or only charged in aid of the general perſonal eſtate:

4thly: Whether the defendant *Thomas Newman* was entitled to two annuities of *30l.* or to one ſuch annuity only.

Mr. Grant and Mr. Alexander for the plaintiff.—As to the firſt point, even if it ſtood upon the will alone, the executor is a truſtee as to the reſidue: but upon the codicil taken together with the will there can be no doubt; for no diſtinction, that can be ſtated upon the will, can apply to the Long Annuities given by the codicil.

It is unneceſſary to argue the general propoſition, that a legacy to an executor turns him into a truſtee as to the reſidue, unleſs a clear intention appears, that he ſhall have the general reſidue as well as the particular bequeſt (*a*). It is equally clear, that a ſpecific legacy will turn him into a truſtee as well as a pecuniary legacy. In *Martin* v. *Rebow*, 1 *Bro. C. C.* 154. that is taken as clear beyond all controverſy. It was ſettled in *Southcot* v. *Watſon*, 3 *Atk.* 226. Beſides the determinations, the ſame reaſon applies to the caſe of a ſpecific legacy; for the executor would take it as part of the reſidue. Mr. Juſtice *Buller*'s language in *Nourſe* v. *Finch* (*ante*, vol. 1. 356.) is to the ſame effect. In this will there are ſeveral ſpecific bequeſts. The only argument in favor of the executor

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(*a*) In *Nourſe* v. *Finch*, *ante*, vol. 1. 344. vol. 2, 78. 4 *Bro. C. C.* 239; and *Clennell* v. *Lewthwaite* and *Thornton* v. *Tracy*, *ante*, vol. 2. 465; 644; this point is fully diſcuſſed; and moſt of the authorities are referred to.

upon the will would be, that as the teſtatrix had a power of appointment, ſhe might have conceived it neceſſary to make a ſpecific appointment; and therefore it may be conſidered as an appointment, not a bequeſt: but for that he muſt admit the other queſtion, that nothing paſſed but what the teſtatrix poſſeſſed under the aſſignments; for that argument would not apply to what ſhe took merely under the will of *Thomas Ewer*. It will alſo be argued upon the ground of exception: but it does not reſemble thoſe caſes. There is however a clear expreſs legacy given to him by the codicil, which is liable to none of thoſe objections: *viz.* the Long Annuities; which are not given by way of appointment or exception, and do not fall within any of the excepted caſes; which are, where ſomething is given by way of exception, or upon a contingency, or an intereſt for life, or limited to a certain period, and not abſolutely.

The next queſtion is, what is to be conſidered as the reſidue: that is, how much paſſes to the executor under what we contend to be a ſpecific bequeſt. Blind as the will is, there is no poſſibility of miſtaking the meaning. If her intention was, as will be contended, to give to the executor all that part of her property, that ſhe derived under the will of *Thomas Ewer*, there was no occaſion for her to refer to the aſſignments; or if ſhe thought that neceſſary, the reference would have been general: but ſhe took great pains to ſet about a very ſpecial recital of the parts of the property of the *Ewers*, that ſhe intended to give him; from which it is evident ſhe only means to give parts. The will is evidently copied from and bears a reference to, ſome other inſtrument, which ſhe had before her or in her contemplation. There are many formal phraſes: but there are alſo many omiſſions. She uſes the word "*aſſigned*" not "bequeathed." Here are inſtruments, that ſatisfy that word, and give it a preciſe ſenſe. If it was not for theſe inſtruments, that word would have no meaning. All the recitals tend to confine it. If there was no omiſſion, ſhe would have added "certain indentures" after the words "by virtue of." The recital is probably copied from the inſtrument, from which this will is evidently formed. She means to ſay, the two kinds of property came to her in the ſame way. She muſt therefore mean the copyhold, which ſhe took by ſurrender, and what ſhe took under the aſſignments. She recites the power of appointment; and uſes the word "*appoint*" among the others. A power of appointment is reſerved to her under the aſſignments and the ſurrender: but there is no ſuch word in the will of *Thomas Ewer*. She would find the words "leaſehold" and "houſehold goods and furniture" in the aſſignments, but not in the will. Looking at the aſſignments it was natural for her to uſe theſe words; and if ſhe had them before her, the inference is clear, that ſhe meant to give only what paſſed to her by thoſe inſtruments.

The third queſtion is, under what terms the executor takes the property ſo ſpecifically bequeathed to him. The annuities and legacies muſt be paid out of that property. The teſtatrix diſpoſes of no other part of her property except the Long Annuities by the codicil. The diſpoſition of this ſpecific part of her property to the defendant, ſubject only to the payment of the annuities and legacies, is the ſame as if ſhe had ſaid, upon condition of his paying them. That is the fund therefore, out of which they are to be paid. She means to die inteſtate as to part of her property and to diſpoſe of another part: but ſhe ſubjects that part expreſsly to the annuities and legacies; which therefore cannot fall upon the reſidue, of which ſhe makes no diſpoſition. The will only relates to that part of her property, of which ſhe diſpoſes. The utmoſt, that could be contended by the annuitants and legatees, would be, that in caſe that fund ſhould fail, they ſhould come upon the general reſidue. The caſes of perſonal eſtate being diſcharged from the debts (*a*) have no analogy to this. In caſes of that kind thoſe, who claim the perſonal eſtate, muſt ſhew, that it is diſcharged; for the Law charges the reſiduary eſtate with the debts. No ſuch neceſſity is impoſed, where the queſtion is, whether legacies are ſpecifically charged. The parties are upon equal terms. The teſtatrix had nothing in view but the copyhold eſtates, and the perſonal property compriſed in theſe aſſignments, which are perfectly equal to the burthen. It is like a gift of real eſtate upon paying a ſum of money. The only caſe, that has any analogy to this, is *Wilſon* v. *Lord Bath*, before Lord *Kenyon*, when Maſter of the *Rolls*. The defendant being entitled to the reverſion of the *Bradford* eſtate charged that eſtate with the ſum of 2000*l.* for the benefit of the plaintiff by deed; but reſerved a power of revocation. He did revoke the uſes by his will; and he deviſed the reverſion of the *Bradford* eſtate, ſubject nevertheleſs among other things to the payment of the ſaid ſum of 2000*l.*,

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(*a*) See *Gray* v. *Minnethorpe*, *ante*, vol. 3. 103. and the caſes there referred to.

charged on that eſtate by the deed, to the *Pulteney* Family. When the reverſion came into poſſeſſion, the bill was filed againſt Lord *Darlington* and Sir *William Pulteney*, the deviſee of the real eſtate. The queſtion between them was, whether the perſonal eſtate or the deviſed eſtate ſhould bear the burthen. There was no gift of the 2000 *l.* except as connected with the real eſtate. Lord *Kenyon* decided, that the real eſtate muſt bear the burthen.

Upon the fourth queſtion, whether two annuities are given to *Newman*, the reſult of the various caſes is, that where two legacies are given to the ſame perſon by the ſame inſtrument, *primâ facie* they are not accumulative; that the preſumption is different, where they are given by different inſtruments; but even in that caſe upon circumſtances it may be conſidered as mere repetition. *Greenwood* v. *Greenwood*, before Lord *Bathurſt*, *Garth* v. *Meyrick*, 1 *Bro C. C.* 30. *Allen* v. *Callow* and *Barclay* v. *Wainwright*, (*ante*, vol. 3. 289; 462.) in which all the other caſes are cited (*a*). In *Barclay* v. *Wainwright*, though the ſecond legacy was given by a different inſtrument, your Honor held it a mere ſubſtitution; though the difference was much more marked than in this caſe. It would require much more than occurs in this caſe to make this accumulative.

Mr. Graham Mr. Richards and Mr. Fonblanque for the defendant the executor.—Upon the firſt queſtion it is contended, that wherever a legacy, be it pecuniary or ſpecific, is given to an executor, it neceſſarily makes him a truſtee as to the reſidue for the next of kin, unleſs there is irreſiſtible proof, that the executor is intended to take it. *Bowker* v. *Hunter*, 1 *Bro. C. C.* 328., which contains an epitome of all the law upon the ſubject, differs eſſentially from the rule ſo ſtated. Lord *Thurlow*'s rule was the reſult of great inquiry, and was adopted by the preſent Lord Chancellor (*b*); that in all caſes the preſumption is, that the executor takes the reſidue beneficially as at law; and nothing will take it from him but an irreſiſtible inference ariſing from the will, or an expreſs declaration, that the executor ſhall not have it. The caſes cited do not ſuſtain the concluſion drawn from them. In *Southcot* v. *Watſon*, though Lord *Hardwicke* ſeems inclined to the opinion, that the inference ariſes as fairly from a ſpecific as from a pecuniary

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(*a*) See alſo *Hodges* v. *Peacock*, *ante*, vol. 3. 735.

(*b*) See *Nourſe* v. *Finch*, *ante*, vol. 2. 82. upon the appeal.

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cuniary legacy, he did not conſider that as concluſive; and he argues particularly upon the circumſtances, ſhewing a clear intention, that the executrix ſhould be accountable for the reſt of the property. In *Nourſe* v. *Finch*, the ſpecific legacy would have decided the caſe at once, if that point is perfectly clear. Notwithſtanding the authorities, that there is not much difference between ſpecific and pecuniary legacies, it cannot be ſaid in all caſes, that becauſe a ſpecific legacy is given to the executor, he is not entitled to the reſidue. We know, that frequently the intention in making an executor is, that he ſhall take all the property not diſpoſed of. There may be good ſenſe in giving a legacy, in all events to preſerve ſomething for the executor. He will be entitled to a horſe ſpecifically given to him, though all the perſonal eſtate is not more than ſufficient for the debts. Many teſtators do not know the extent of the perſonal eſtate or of their engagements. Mr. Juſtice *Buller* in *Nourſe* v. *Finch* lays down the rule too broadly. He alſo thought, no evidence could be admitted but as to what paſſed at the time of making the will: but the Lord *Chancellor* differed from him upon that. Neither of them however decided the caſe upon the ſpecific legacy. Appointing this defendant ſole executor is as much as to ſay, he only ſhall have to do with her property. *Lawſon* v. *Lawſon*, 7 *Bro. P. C.* 511. proves, that the mere circumſtance of a legacy to the executor is not concluſive; and that it is not neceſſary for him to do more than to ſhew, that his legal title is not inconſiſtent with the intention appearing on the will; as it is, where a legacy is given him for his care and trouble, or where he is made executor in truſt. The teſtatrix cannot be taken to make the diſtinction, that after her huſband's death the property was her own, and did not require appointment; as ſhe might be ſuppoſed to think before. She gave the Long Annuities by the codicil for the ſame miſtaken reaſon; that it would not paſs without a ſpecific appointment. The inſtruments, if they lay before her, probably miſled her to think an appointment neceſſary as to that alſo; and that otherwiſe it would not paſs; and probably at the ſame time it occurred to her, that it was neceſſary particularly to mention the houſehold goods, &c. It has never been determined in *ſpecie*, that a legacy by a codicil excludes an executor. It is certainly difficult to ſupport the diſtinction: but put the caſe of property acquired after the execution of the will: the teſtatrix might have thought, that property would not have paſſed by the will. A legacy by a codicil therefore is not ſo concluſive as a legacy by the will. The exception will not apply to any thing, unleſs the appointment of the executor is held to carry the reſt. The diamond ear-rings and wearing apparel could not come out of that ſpecific property; for they were part of the perſonal property of the teſtatrix herſelf. What could be ſubject to this exception but the general property? How is the annuity to *Robinſon* to be paid, except out of the general aſſets?

Upon the ſecond queſtion it is impoſſible to ſay, all the property, ſhe had from *William* and *Thomas Ewer* did not paſs to the defendant. The words "by virtue of" may refer to various titles. Can it be ſuppoſed, that after an anxious and careful enumeration of her property ſhe meant to give theſe trifling benefits to the principal object of her bounty? Is the word "*aſſigned*" occurring in a will, acknowledged very inaccurate, to be conſtrued in its appropriate legal ſenſe? It means made over to her; and will apply to the will. She might be miſled as to that word by the will of *Thomas Ewer*; which directs the truſtees to aſſign to her. The ſenſe of that word is ſurely large enough to comprehend in the contemplation of an ignorant perſon property otherwiſe given. The plaintiff cannot reſort to the aſſignments; which are *dehors* the will.

Upon the third point: this is the common caſe of a ſpecific deviſe charged with debts or legacies without any words to mark, whether the ſubject deviſed is excluſively charged, or only charged in aid of the general perſonal eſtate. Nothing but neceſſary inference can diſcharge that natural fund. Where is that neceſſary inference? The intention is only, that theſe legacies and annuities muſt at all events be paid. It is not a gift upon condition, but ſubject to the payment of them. The caſe before Lord *Kenyon* is not applicable. There were circumſtances, that the Court was entitled to look at. A ſpecific eſtate was charged with a ſum of 2000*l.* for a very active and uſeful agent. Then the teſtator not chooſing to do it in that way gave the eſtate by way of ſpecific deviſe ſubject to that ſum of 2000*l.* The concluſion is inevitable, that it was intended to come out of that eſtate, and not as a general debt. If this was given to a perſon, who was not executor, it would make a great difference. It is very ſtrong to argue, that where the teſtatrix has not given the reſidue, and it goes to the next of kin, becauſe no intention concerning it appears, they ſhall take it, as if it was expreſsly diſcharged. Claiming the reſidue, becauſe no intention is expreſſed about it, can they call upon the defendant to put back into that reſidue what he takes by the expreſs bounty of the teſtatrix? The queſtion always muſt be, whether a condition is impoſed? They are driven to ſtate it as a condition: but it is nothing more than a charge, which in all events provides for the payment of the annuities and legacies. It is like the caſe, where an eſtate is deviſed charged, and another eſtate is left to deſcend. It is ſuppoſed, that a mere abſence of intention will do. Will a deviſe ſubject to a mortgage exempt the perſonal eſtate? A diſtinction has been attempted between a direct charge and a gift ſubject to the payment of a ſum of money. That diſtinction is reprobated by Lord *Thurlow* in *Donne* v. *Lewis*, 2 *Bro. C. C.* 262.: but even a direct charge will not exonerate the perſonal eſtate, unleſs there are affirmative or negative words to exempt it. There is no authority for the diſtinction between debts and legacies, as applied to this ſubject. The teſtator may have the ſame purpoſe in making an auxiliary fund for the payment of legacies as of debts, where there is a fund, that would not be ſubject to debts.

Upon the fourth point the counſel for the executor contended, that the defendant *Newman* was entitled only to one annuity of 30 *l.* In addition to the other caſes in ſupport of the general rule they cited the late caſe of *Conolly* v. Lord *Dartmouth*, and *Bell* v. *Conway*, (cited *ante*, vol. 3. 292.) before the Lord *Chancellor*.

Mr. Daniel for the defendant Newman, the annuitant.—It is too late to diſpute the general rule as to double legacies: but the doctrine is conſidered as very ſtrange in *Maſters* v. *Maſters*, 1 *P. Will.* 421. and by Mr. Juſtice *Aſton* in *Hooley* v. *Hatton*, 1 *Bro. C. C.* 390. *n.* Very ſlight circumſtances will be ſufficient to ſhew, that it is meant to be accumulative. It is poſſible, that the intention might be to charge one of theſe annuities upon the property ſpecifically given; and that the other ſhould come out of the general perſonal eſtate.

Reply.—The firſt queſtion is eſtabliſhed by repeated deciſions. If it was a new queſtion, I might admit, that a plain and neceſſary inference does not ariſe from the circumſtance of a legacy to the executor; and that there may be reaſon for giving him a legacy; though he takes the reſidue: but it is now decided, that *primâ facie* a legacy makes him a truſtee; as the appointment of an executor gives him *primâ facie* a right to the reſidue. The executor muſt ſhew ſome particular circumſtances; for if it is given purely, abſolutely, and does not come under any of the exceptions, the preſumption does ſtand in Equity.

Upon the ſecond point, it is impoſſible, that the teſtatrix could mean a general diſpoſition. The enumeration by the teſtatrix of the property, ſhe means to diſpoſe of, negatives that. It is objected, that the defendant cannot reſort to the aſſignments; which are *dehors* the will: but the plaintiff goes much more out of the will by referring to the will of *Thomas Ewer*, to which there is no reference in that of Lady *Wood*. It is abſolutely neceſſary to ſee, what property the teſtatrix had under the aſſignments; and it is not going out of the will; which refers to ſome aſſignment. If one gives all the property he had from *A.* to another, it is abſolutely neceſſary to inquire, what that property is. All the property, the teſtatrix recites, is noticed as coming to her in the ſame way, and is to be diſpoſed of in the ſame way. There is nothing in the will of *Thomas Ewer* about leaſehold, houſehold goods, furniture, *&c.* It does not even contain the words "perſonal "eſtate:" but thoſe words do occur in the deeds of aſſignment; and upon the ſuppoſition, that ſhe was copying from them, and meant to confine herſelf to the words in them, it was not unnatural, that ſhe ſhould uſe the words "perſonal eſtate." There are ſome articles, that would not come under any other words. The introduction of them was neceſſary to carry the whole of what does paſs under the aſſignments. What is the uſe of all this recital, if ſhe meant to paſs every thing?

Upon the third queſtion it is contended, that it is neceſſary to find as ſtrong and explicit an intention to exonerate a reſidue as in the common caſe to exonerate the perſonal eſtate from payment of the debts. There is not the leaſt reſemblance. This is not a caſe of debts. The perſonal eſtate is the proper fund for the debts. This is not a caſe of legacies generally. It is not a caſe of a

complete

complete teſtacy. It is a caſe of partial inteſtacy coupled with certain ſpecific diſpoſitions. She ſays, whatever ſhe gives is to come out of that ſpecific fund, becauſe ſhe does not mean to make any diſpoſition out of any other part. There is an immediate connection between theſe legacies and the fund, upon which they are charged. It is given ſubject to the payment of the legacies. There is no difference between this and the caſe before Lord *Kenyon.*

The point as to the double annuity cannot be ſeriouſly contended ſince the late caſes, *Allen* v. *Callow*, and *Barclay* v. *Wainwright.*

There was ſome diſpute at the Bar as to the property, the teſtatrix had at the time of making the will. It was ſaid for the executor, that before ſhe made the will ſhe had parted with the property, ſhe took from *Thomas Ewer* under the aſſignment; which was denied by the plaintiff. It was alſo ſuggeſted, that the property given by the codicil might have been acquired after the will was made.

The Maſter of the *Rolls* propoſed an inquiry: but it was declined; and the parties appeared to admit, that the ſubjects compriſed in the will and codicil were compoſed of what the teſtatrix derived from the *Ewers* under the aſſignments and the will and of other perſonal property belonging to her.

Maſter of the Rolls.—I do not find, that they are deſirous of an inquiry to bring before the Court the exact ſituation of the property. Therefore I am to take it, as it ſtands upon the kind of admiſſion at the Bar, and upon the proof of theſe aſſignments and what they contained.

As to the points in this cauſe, the only doubt, I had, was as to what is compriſed in the bequeſt to Sir *Francis Wood* in the outſet of the will. I did conceive, the words "perſonal eſtate" might require ſome ſubject, to which they could be annexed: but I am now ſatisfied upon the language of the aſſignments and the argument for the plaintiff, to which I cannot frame an anſwer, that if the object was to give to him all the property that ever had belonged to them, it is impoſſible to ſuppoſe, ſhe would have uſed all theſe words. She would have ſaid, "I give all the property, "that belonged to *William* and *Thomas Ewer*." She has by blind words certainly endeavoured to ſelect part of the property belonging to them; which ſhe intended to give to him as a ſpecific bequeſt. Next, to what part of the property could ſhe mean to apply the words "leaſehold hereditaments, houſehold goods, furniture," &c. They have produced two aſſignments, which, without commenting upon the word, are entitled, and indorſed upon the back of them, "Aſſignments" made by *Aſhley* of particular effects belonging to *Thomas* and *William Ewer*; and which by two inſtruments, technically to be called aſſignments, he did convey to her; and the words of the bequeſt do to a certain degree tally with the aſſignments. It is ſaid, there are houſehold goods and other articles, which could not poſſibly be comprehended in the aſſignments: but it is plain, they were comprehended under the words "perſonal eſtate." The words are pretty much the ſame in both the aſſignments. The words "houſehold goods and "furniture" are ſatisfied by the words of the will; and the other articles are referred to as part of the reſidue of the perſonal eſtate of *Ewer*. When I am to put a conſtruction upon words, which are certainly to be conſidered as words of reſtriction, I do not know where to ſtop, unleſs I refer to theſe aſſignments. I have nothing to reſtrain it by but them. There are no other limits. I muſt give the whole, and cannot ſtop, if I do not apply the will to theſe aſſignments; and then I muſt recur to this abſurdity; that meaning to give all the property, that ever did belong to them, the teſtatrix uſes all theſe words of reſtriction. It is ſaid, thoſe words will apply to theſe aſſignments; and upon the fair conſtruction of them I am bound to hold, that the reſtriction applied to them. I am in this dilemma; that I am obliged to give theſe words a reſtrictive effect; and there is nothing to reſtrain them to but the aſſignments.

The next queſtion is, whether this ſpecific bequeſt is a gift to the executor, charged with the original creation of certain legacies; and from the payment of which as executor he is diſcharged? The counſel for the plaintiff ſeem to have forgot, that the legatee is the ſame perſon, who by virtue of his office would be obliged to pay every legacy not ſpecifically charged upon and ſolely to ariſe out of ſome other ſubject not given to the executor. At the time, I am aſked to reſtrain the bequeſt to him to the property acquired under the aſſignments, I am alſo deſired to ſubject certain articles expreſsly comprehended in the will, which do not form any part of the ſubject, out of which the aſſignments are ſuppoſed to ariſe. The ear-rings and the wearing apparel, it is admitted, formed no part of the ſubject of the aſſignments. When I am aſked to make the legatees liable to loſe their legacies, if the fund, upon which they are ſpecifically charged, is deficient, I ſhall look with very jealous eyes to ſee, if I cannot make them general legacies. When I come to give my opinion upon the other point, that the executor as ſuch does not take the general reſidue I ſhould make a very harſh deciſion by holding, that theſe ſpecific funds only are liable to the legacies and annuities. The effect is only to make theſe ſpecific funds liable, if the general perſonal eſtate, which as ſuch is applicable to the payment of the legacies and annuities, ſhould not be ſufficient.

Upon the next queſtion, whether as executor he takes the whole? I have already declared my opinion. Suppoſe, the ſpecific bequeſt of this property ſo charged by the will would not bar him, the codicil has barred him according to every rule. How can the defendant get over the codicil? If the rule was, that there muſt be an irreſiſtible inference, parol evidence could not be admitted. Therefore that is not the rule. But in this caſe the teſtatrix has by the codicil given part of the reſidue to the executor. It is clear, ſhe did not think, that by making him executor ſhe had given him every part of her perſonal property. That part which ſhe thought had not paſſed, ſhe has by expreſs words given to him. He is barred by the ſpecific legacies in the will, and more by thoſe in the codicil. If the teſtatrix thought, ſhe had given him the whole, ſhe would not have given him part by way of ſpecific diſpoſition.

Declare, that under the ſpecific bequeſt ſuch leaſehold premiſes, furniture, and effects, late belonging to *William* and *Thomas Ewer*, as were compriſed under the aſſignments, only, paſſed to the defendant Sir *Francis Lindley Wood*; that the ſaid defendant as executor is not entitled to the general reſidue of the teſtatrix's perſonal eſtate; but it belongs to the next of kin, ſubject nevertheleſs to the payment of the annuities and legacies in the firſt inſtance; and that the ſpecific bequeſt to the executor of the ſeveral articles hereinbefore mentioned is not to be conſidered as the primary fund for the legacies and annuities, but as an auxiliary fund, in caſe the general perſonal eſtate is not ſufficient; and declare, that the ſecond annuity of 30*l.* given to the defendant *Thomas Newman* is not to be conſidered as accumulative, but as the ſame annuity of 30*l.* given to him in the prior part of the will.

BOWERS *v.* CATOR.

July 25th.

Bill for ſpecific performance of a parol agreement for a leaſe within the *Statute of Frauds*, charging poſſeſſion taken under the agreement and other acts of part performance: plea of the *Statute*, and anſwer, not denying the acts alledged as a part performance; but ſtating, that being adviſed, he entered as tenant at will, he gave notice to quit: plea over-ruled.

THE bill ſtated, that the defendant in *June* 1797 applied to the plaintiff, for a leaſe of a houſe, of which the plaintiff was ſeiſed in fee, at *Chaſe-ſide*, *Enfield*. The plaintiff ſaid, he had many applications, and was then in treaty with a perſon, named *Armſtrong*; to whom he had propoſed to grant a leaſe determinable at the end of ſeven, fourteen, or twenty-one, years, at the option of *Armſtrong*, at the rate of 40*l.* a-year, from *Midſummer* 1797, upon *Armſtrong*'s agreeing to keep the ſame in good repair and to execute a leaſe with the uſual covenants, and to pay all taxes then impoſed, or ſuch other taxes, as might happen to be impoſed, except the land-tax, and to take the fixtures at an appraiſement; but that if *Armſtrong* ſhould not agree to accept a leaſe upon ſuch terms before the 26th of *June*, the plaintiff would let the ſaid houſe and premiſes to the defendant upon the ſame terms, that he had propoſed to *Armſtrong*; and the defendant then agreed to accept a leaſe of the ſaid houſe and premiſes upon thoſe terms, in caſe *Armſtrong* ſhould refuſe to take the ſame; and the defendant requeſted the plaintiff to inform ſuch perſons, as had applied or might apply for a leaſe, that the defendant would take it, if *Armſtrong* did not; and the plaintiff accordingly wrote to ſeveral perſons, who had applied to him for a leaſe, to that effect. The plaintiff in conſequence of ſuch agreement made the following memorandum in his own hand-writing; which he afterwards ſigned with the initials of his name:

"Agreed with Mr. *Cator* of *Guilford-Street*, that in caſe Mr. "*Armſtrong* does not take my houſe on or before *Monday* next "the 26th of *June* 1797 upon leaſe for ſeven, fourteen, or twenty-"one, years (keeping the ſame in good repair) the leaſe to run "with the uſual covenants at 40*l.* a-year from *Midſummer* "1797, paying all taxes, or what other taxes may happen, except

“ land-tax, then Mr. *Cator* is to have it. Suppoſing the houſe “ let have accordingly by Mr. *Cator*'s deſire wrote to that effect “ to ſome applications: all the fixtures to be taken by appraiſe- “ ment. *N. W. B.*”

Armſtrong having declined taking a leaſe of the ſaid houſe and premiſes, becauſe they were on too ſmall a ſcale, the plaintiff on or about the 21ſt of *June* 1797 ſigned the ſaid memorandum with the initials of his name; and delivered the ſame to *Parry*, his attorney, and directed him to call, and inform the defendant, and to prepare a leaſe according to the agreement. *Parry* called on the 21ſt or 22d of *June*, and read the memorandum to the defendant; who agreed to accept a leaſe for a term of twenty-one years determinable at the end of the firſt ſeven or fourteen years, if he thought proper, upon the terms mentioned in the ſaid memorandum or agreement; and *Parry* copied the memorandum with the aſſent of the defendant, as inſtructions for him to prepare a leaſe from the plaintiff to the defendant; and the defendant in purſuance of the ſaid agreement on or about the 25th or 26th of *June* 1797 entered into poſſeſſion of the ſaid houſe and premiſes, and took poſſeſſion of the fixtures therein, and hath ever ſince been in poſſeſſion thereof. Some diſputes having ariſen between the plaintiff and defendant as to what fixtures ought to be purchaſed by the defendant, and what ſhould be taken as belonging to the houſe, and the value thereof, the plaintiff agreed to leave the ſame to —— *Erwood*; who was recommended to him by the defendant; who propoſed to leave the ſame to the ſaid *Erwood*; and the plaintiff and the ſaid appraiſer accordingly with the conſent of the defendant made an inventory or account and valuation of ſuch fixtures, as the defendant ought to purchaſe; and the value thereof amounted to —— which yet remains unpaid; and the defendant alſo purchaſed certain other fixtures in the houſe; which belonged to the former tenant. The plaintiff has been always ready to grant a leaſe according to the true intent of the ſaid agreement; and in *December* laſt cauſed a draft of a leaſe to be prepared and ſent to the defendant by *Parry*: but the defendant returned the ſame with the following memorandum thereon:

“ I am ſurpriſed, you ſhould ſend me this draft, after having “ given Mr. *Bowers* notice to quit. Had I been in the way, “ when it was left, I ſhould have returned it by the ſame hand, “ that brought it. *C. W. Cator.*”

Parry afterwards tendered a leaſe: but the defendant refuſed to execute.

The bill charged, that the agreement is to be taken as reduced to writing; but if not, that the defendant entered into poſſeſſion of the ſaid houſe and premiſes under and by virtue of ſuch agreement before mentioned; and ſtill is in the occupation thereof under the ſaid agreement; and that he purchaſed divers fixtures, as before mentioned, of which he is in poſſeſſion; which muſt be taken as a part-performance of the ſaid agreement; and that he ought not therefore now to be permitted to object to carrying the ſaid agreement into execution.

Then in anſwer to the pretences, that the houſe was not in tenantable or habitable repair, and that the defendant mentioned it at the time he took poſſeſſion, and that the plaintiff refuſed to repair, the plaintiff charged, that at the time the defendant took poſſeſſion, the houſe was in a very tenantable and habitable ſtate; and he never made any objection to the condition of the houſe, until he had been long in the occupation thereof; and ſubmits, that if it had not been in proper repair, and if the plaintiff was bound to repair, yet the defendant having taken poſſeſſion, and not having made any objection to the ſtate of the houſe till long afterwards, he ought not now to be permitted to make the objection.

The plaintiff farther charged, that in order to avoid any diſpute with the defendant, *Parry* on the 22d of *December* 1797, before the notice to quit had been given, wrote to the defendant, that *Bowers* was deſirous of knowing, what the defendant expected to be done to the houſe; and if the defendant would favour him with the particulars in writing, he would wait upon *Bowers*, and immediately ſend the defendant his determination: although Mr. *Bowers* did not conſider himſelf bound to repair, yet rather than there ſhould be any difference, he was inclined to do it; and upon the 25th of *December* following *Parry* by another note again requeſted to know, what repairs the defendant required. The defendant ſent no anſwer: but after receiving the firſt note he ſent a notice to quit to the plaintiff. The bill alſo charged, that the defendant refuſed an arbitration; and prayed a ſpecific performance of the agreement.

To this bill the defendant put in the following plea and anſwer:

To ſo much and ſuch part of the ſaid bill, as ſeeks from this defendant diſcovery and relief concerning an agreement thereby pretended to have been made and entered into for granting a leaſe by the ſaid complainant unto this defendant of the houſe and premiſes in the bill mentioned, and as ſeeks to compel this defendant ſpecifically to perform the ſaid pretended agreement, and to accept a leaſe of the ſaid houſe and premiſes upon the terms in the bill mentioned, the defendant pleads in bar the *Statute of Frauds*:

And this defendant not waiving his ſaid plea, but wholly relying and inſiſting thereon, for anſwer to the ſaid bill, or to ſo much and ſuch part thereof as this defendant is adviſed, that it is in anywiſe material or neceſſary for him to make any anſwer unto, anſwereth and ſaith, he admits, he did at or about *Midſummer* 1797 enter into poſſeſſion or occupation of the houſe and premiſes in the bill mentioned: but the defendant being adviſed, that he only entered thereupon as tenant at will to the plaintiff, and being deſirous of quitting the poſſeſſion thereof, did upon the 22d of *December* then next following give the plaintiff notice, that the defendant ſhould upon *Midſummer* 1798 quit poſſeſſion. This defendant did accordingly quit and leave in the beginning of *May* 1798; and is not now, nor hath been ever ſince, in the occupation thereof; and this defendant denies, that any agreement in writing ever exiſted between the plaintiff and defendant, as in the ſaid bill mentioned; or that the defendant entered in conſequence of any written agreement whatſoever; and the defendant admits, that he was in treaty with the plaintiff for the purchaſe of his fixtures in the ſaid houſe and premiſes; but denies, that any actual purchaſe of any of the fixtures or fixture in the ſaid houſe and premiſes ever took place by the defendant of the plaintiff or any other perſon or perſons whatſoever, or any act whatſoever to the knowledge or belief of the defendant, which can or ought fairly to be conſidered as a part-performance of the ſaid pretended agreement, or with reference thereto.

Mr. Romilly and Mr. Bell for the plaintiff.—The plea, as far as it is a plea, that the defendant had not ſigned the agreement or authoriſed any perſon to do ſo, does not apply; for this is a caſe of a parol agreement in part executed. It is not put as an agreement ſigned by the defendant. It was neceſſary for him to have anſwered

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anſwered as to the part-performance. According to all the deciſions this is a part-performance; and he has not denied it. He has taken poſſeſſion under this agreement; and was not in poſſeſſion before. Lord *Aylesford's caſe*, 2 *Str.* 783. which is exactly this caſe, has been frequently recogniſed, and particularly in *Whitchurch* v. *Bevis*, 2 *Bro. C. C.* 559. From *Butcher* v. *Stapeley*, 1 *Vern.* 363. *Pyke* v. *Williams*, 2 *Vern.* 455. *Clerke* v. *Wright*, 1 *Atk.* 12. *Lacon* v. *Mertins*, 3 *Atk.* 1. and *M'Leiſh* v. *Tate*, *Cowp.* 781. it is plain, that taking poſſeſſion is a part-performance (*a*). The circumſtance, that poſſeſſion was taken under the agreement, diſtinguiſhes this from the late caſe of *Wills* v. *Stradling* (*ante*, vol. 3. 378). The anſwer does not ſupport the plea. It is neceſſary for the defendant pleading the *Statute* and denying part-performance to deny poſitively the circumſtances of part-performance; which is a queſtion of fact: but this defendant ſays, he is adviſed, that he entered and took poſſeſſion as tenant at will. It is a mere fact within his own knowledge only. He ought to have ſtated an agreement, that he ſhould hold from year to year. He only ſwears as to the opinion of ſome other perſon. In *Mitf.* 212. it is ſtated, that "in all theſe caſes, if any matter is charged "by the bill, which may avoid the bar created by the *Statute*, "that matter muſt be denied generally by way of averment in the "plea; and it muſt be denied particularly and preciſely by way "of anſwer to ſupport the plea." In a late caſe before your Lordſhip *Moore* v. *Edwards* (*ante* 23) the bill prayed a ſpecific performance; charging money laid out in repairs, as a part-performance. Your *Lordſhip* held, that the defendant ought not to put in an argumentative plea, but ought to reduce the caſe to a ſingle point. This is in form a plea, and in ſubſtance an inſufficient anſwer.

Solicitor General for the defendant.—The real queſtion is, whether there was an agreement between the parties; and it appears by the letter ſtated at the cloſe of the bill, that the agreement never was concluſive. The bill does not ſtate, that the defendant was called upon to ſign a ſimilar agreement. The moſt important part of the agreement, relative to the condition, in which the houſe was to be placed for the leaſe, remained unaſcertained.

(*a*) The principal caſes upon this point are collected in the note, *ante*, vol. 3. 39.

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It cannot be contended, that, where the bill charges, that poſſeſſion was taken in purſuance of the parol agreement, the Court will not expect a denial, that poſſeſſion was taken in purſuance of that agreement: but when the bill ſhews, that a moſt important part of the contract remained unſettled, and continued ſo long after poſſeſſion was taken, the poſſeſſion could not be taken upon that, which was to be the binding contract between the parties. It was a poſſeſſion only for the purpoſe of occupying the houſe as tenant at will, till that important part of the agreement in diſcuſſion between them could be ſettled. For that purpoſe it remained open.

As to the plea not meeting the bill, Lord *Thurlow* felt a difficulty to conceive, how this defence came to be in the form of a plea, where there is no charge in the bill, that there was an agreement in writing. Upon original reaſoning perhaps that is not the proper form.

Lord Chancellor.—The letter ſent in *December* does not admit, that the plaintiff was bound to do any repairs. According to the terms of the memorandum the defendant is to keep in repair; but only according to the condition, in which he found the houſe. The letter does not admit, that there was an obligation upon the part of the plaintiff to do any thing: but to avoid diſputes he conſented to do ſomething, if the defendant would let him know, what he wanted.

The plea muſt be over-ruled; for the anſwer does not ſupport it at all. It is quite evaſive as to the ſtatement of poſſeſſion under and by virtue of the agreement. The defendant avers, that he did not take poſſeſſion in conſequence of any written agreement. There was not any in the ſenſe, in which he uſed it; for he never agreed in writing; and inſtead of anſwering the facts alledged as a part-performance he ſays, that being adviſed, that he took poſſeſſion as tenant at will, he therefore gave a notice to quit.

Plea over-ruled.

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July 26th.

CREWE *v.* DICKEN.

One truſtee for the ſale of an eſtate having releaſed and conveyed to his co-truſtee refuſed to join in the receipt of the purchaſe-money: upon the ſpecial expreſſion of the deed the purchaſer was not held to the agreement with the remaining truſtee: it would have been otherwiſe, if one had merely renounced.

Quære as to the [illegible]

Note that Lord Chr Hardwicke was named a trustee in the will of Sir John Frederick, & on latter's death in 1750 refused to act except by transferring so as to vest in a new trustee in his place & his lordship's co-trustee in the will. This appeared to me in a title laid before me by Messrs Aubrey Hill & Strong. A.H. 12 Apr. 1805. Note, that the transfer was under order of Chancery appointing new trustee. A.H.

See my opinion on case of Lord [illegible] & his cotrustee Mr James Cocks 31 Jan. 1809.

BY indentures, dated the 7th and 8th of *February* 1772, executed previouſly to the marriage of *John Cornway Glynn* and *Sarah Crewe*, *Sarah Crewe* the elder conveyed certain real eſtates to the uſe of herſelf for life; remainder to the uſe of Sir *William Wheeler*, *Offley Crewe*, and *Thomas Boydell*, their heirs and aſſigns for ever, in truſt, that they the ſaid Sir *William Wheeler*, *Offley Crewe*, and *Thomas Boydell*, and the ſurvivor of them, and the heirs and aſſigns of ſuch ſurvivor, ſhould after the death of *Sarah Crewe* the elder ſell the ſaid eſtates for the beſt price, that at the time of the ſale can in the judgment of the ſaid truſtees be had: and apply the money ariſing by the ſale thereof upon the truſts therein mentioned; provided, and it was thereby declared and agreed, and *Sarah Crewe* the elder for herſelf, her heirs, executors, adminiſtrators, and aſſigns, did thereby declare, direct, limit, and appoint, that the receipt or receipts of the ſaid Sir *William Wheeler*, *Offley Crewe*, and *Thomas Boydell*, and the ſurvivor of them, and the heirs and aſſigns of ſuch ſurvivor, of the purchaſe-money to ariſe from ſuch ſale of the ſaid eſtates or any parts thereof ſhall be full and ſufficient diſcharges for the ſame to the purchaſer or purchaſers thereof, his, her, or their, heirs or aſſigns, reſpectively; and that ſuch purchaſer or purchaſers ſhall not be farther anſwerable or accountable for the application of ſuch, his, her, or their, purchaſe-money, nor be any way obliged to ſee the ſame applied upon the truſts therein contained; and that from the time or times of making ſuch ſales the purchaſer or purchaſers of the ſaid premiſes reſpectively and his, her, or their, heirs and aſſigns, ſhall hold and enjoy diſcharged from all right, title, claim, and redemption, whatſoever of each and every perſon or perſons claiming under *Sarah Crewe* the elder or any of her anceſtors; and it was declared, that it ſhould be lawful to and for the ſaid Sir *William Wheeler*, *Offley Crewe*, and *Thomas Boydell*, and the ſurvivor of them, his heirs, executors, adminiſtrators, or aſſigns, from time to time to deduct and retain out of all or any of the moneys, which ſhould by virtue of theſe preſents or any truſt therein declared come to their or any of their hands, all coſts, charges, &c, which they or any of them ſhall expend or be put unto, or in anywiſe ſuſtain, in executing or performing the truſts; and that they the ſaid Sir *William Wheeler*, *Offley Crewe*, and *Thomas Boydell*, and the ſurvivor

See the case of Duke of Bucks v. Lord Chancellor in L. Nottingham's Prolegomena of equity ch. 17 Vol. 16.

ſurvivor of them, his heirs, executors, adminiſtrators, or aſſigns, ſhall be charged and chargeable only each of them for and with his own reſpective receipts, payments, acts, and wilful defaults, and not the one for the other; nor ſhall they or any of them be charged or chargeable with any ſum or ſums of money other than ſuch as ſhall actually and reſpectively come to his or their own hands ſeverally and reſpectively by virtue of theſe preſents, nor with any loſs, which may happen in remitting, paying, or applying, the moneys, or by depoſiting the ſame in any Bank for ſafe cuſtody, nor with any loſs, which may happen relative to any of the truſts aforeſaid, without his or their reſpective wilful default.

The marriage took effect; after which *Sarah Crewe* the elder and *Thomas Boydell* died. Sir *William Wheeler* being unwilling to act in the truſts after the death of *Boydell* by indentures of leaſe and releaſe, dated the 26th and 27th of *October* 1776 conveyed and releaſed all and ſingular the ſaid premiſes and all his eſtate and intereſt therein to *Offley Crewe* and his heirs.

Offley Crewe afterwards contracted with *Thomas Dicken* to ſell ſome of the ſaid eſtates to him for 7500*l.*; and a proper agreement in writing was executed between them for that purpoſe: but *Dicken* refuſed to take the conveyance, unleſs Sir *William Wheeler* would join in the receipt of the purchaſe-money; which he declined. The bill was therefore filed by *Offley Crewe* againſt *Dicken* to compel a ſpecific performance of the agreement.

The defendant ſubmitted by his anſwer, that the receipt for the purchaſe-money ſigned by the plaintiff alone will not be a ſufficient diſcharge for the ſame; and that Sir *William Wheeler* ought to join in the receipt.

Solicitor General and Mr. Richards for the plaintiff.—The difficulty ariſes from Sir *William Wheeler*'s having conveyed the eſtate to the other truſtee. It would be perfectly clear, only that the inſtrument, he has executed, is not that ſort of inſtrument, that he ought to have executed, for he did not execute the deed of truſt; nor did he ever act in it. In Sir *Thomas Rumbold's Caſe* he refuſed to accept upon the authority of *Bonifaut* v. *Greenfield*, *Cro. El.* 80. which cites *Statute* 21 *Hen.* 8. *c.* 4. Nothing veſted in him; and it was the ſame as if he was actually dead. The plaintiff's conveyance and receipt will be ſufficient. Sir *William Wheeler* has releaſed all his intereſt to

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the plaintiff; and a releaſe from one joint-tenant to another will releaſe all the eſtate, he ever had. Undoubtedly it all paſſes at law; and in the ſame manner the whole equitable eſtate is by the releaſe veſted in the other, to whom the releaſe is made.

Attorney General and Mr. Steele for the defendant.—This objection is well founded. Where an eſtate is deviſed or conveyed to truſtees upon truſt to ſell, and no authority is given to them to diſcharge the purchaſer and by their receipt prevent the neceſſity of his ſeeing to the application of the purchaſe-money, it has been much controverted, whether their receipt would have that effect. In a caſe at the *Rolls*, though it was not decided, Lord *Kenyon*, then Maſter of the Rolls, inclined ſtrongly to the opinion, that having the power to ſell they muſt have the power incident to the character, *viz.* the power to give that diſcharge. This is very different from that caſe, and from the ordinary caſe, where the power to diſcharge the purchaſer by the receipt of the truſtees is given. The manner, in which the truſt is created by this ſettlement, is by making them firſt joint-tenants by expreſs conveyance: but the mode, in which they are to exerciſe the power of ſale, and to give the receipt is not by making a truſt to them, their heirs and aſſigns; but the parties having repoſed their confidence in the judgment of theſe three truſtees direct, that they, the ſaid Sir *William Wheeler*, *Offley Crewe*, and *Thomas Boydell*, and the ſurvivor of them, and the heirs and aſſigns of ſuch ſurvivor, ſhould ſell for the beſt price, that can in the judgment of the ſaid truſtees be had: then follow the directions as to the application of the purchaſe-money, and that the receipt or receipts of the ſaid Sir *William Wheeler*, *Offley Crewe* and *Thomas Boydell* and the ſurvivor of them and the heirs and aſſigns of ſuch ſurvivor ſhall be a ſufficient diſcharge to the purchaſer. A conveyance by them to three other truſtees would veſt the eſtate in them: but it is very difficult upon the expreſſion of this deed, that the judgment of theſe perſons ſhall be exerciſed, and that the receipt of theſe perſons ſhall be a diſcharge, to ſay, that the judgment or the receipt of the others was meant. Suppoſe, *Crewe* had died, and the eſtate had deſcended upon his heir, Sir *William Wheeler* ſtill living: it is impoſſible to ſay, the heir of *Crewe* is the heir, whoſe judgment was to be exerciſed, and whoſe receipt was to be given. The power alſo is collateral, and incapable of delegation. The caſe cited would not cure the difficulty, even if Sir *William Wheeler* had

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not acted at all. In that caſe the four truſtees were alſo executors; and the Court ſeemed to be of opinion, the deviſe was to them *quà* executors; and that the teſtator muſt be preſumed to know, that thoſe only, who acted, would be his executors. Therefore unleſs ſome bill is filed by thoſe, who are to have the purchaſe-money, or Sir *William Wheeler* can be brought before the Court to join, it is not poſſible to ſay, the purchaſer is not bound to ſee to the application of the money. The defendant therefore cannot be compelled to take the eſtate upon the receipt of one truſtee only.

Reply.—If a perſon refuſes to accept a truſt, it is preciſely the ſame as if he was not named: *Smith* v. *Wheeler*, ~~2~~1 *Vent.* 128. The power is not collateral; for the ſale is part of the truſt and the purpoſe, for which the eſtate is veſted in the truſtees. *Attorney General* v. *Gleg*, 1 *Atk.* 356. (*a*) illuſtrates this as to the principle; that the diſcretion is left to all the truſtees.

Lord CHANCELLOR.—I do not feel, how it is poſſible to help the plaintiff. If he had renounced, as in the caſe, that has been put, he might diſſent, where no eſtate paſſes. The whole eſtate would have been in the plaintiff, exactly as if the two other truſtees had died in the life of the teſtator. He would have been the only perſon. But according to the way, they have managed it, he has accepted the truſt, and conveyed away the eſtate. That part of the truſt, that conſiſts in the application of the money, he could not convey away. The hazard probably is not great: but I do not know how to make the purchaſer run the hazard. Taking the title with knowledge of the truſt he would be bound to ſee to the application of the money. I do not feel, that I can make the purchaſer paſs over this objection.

Had you not better file another bill on behalf of the *Ceſtuys que truſt*, praying a ſale; and there may be an inquiry, whether the ſale, that has been made, is beneficial?

The cauſe ſtood over upon the application of the Counſel for the plaintiff; in order to conſider, whether the bill ſhould be amended, or another bill ſhould be filed.

(*a*) Reported alſo in *Ambler* 584.

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Teſtator deviſed real eſtate to *A.* in tail male; remainder over; and gave a ſum of money in truſt to be laid out in land, to be ſettled to the ſame uſes: by codicil he deviſed the ſame real eſtate to *B.* and his heirs; and gave every thing, he had given by his will to *A.*, in as ample a manner to *B*: *B.* is tenant in fee of the real eſtate; and is entiled to have the money paid to him.

Truſtee charged with intereſt.

HENRY GAPPER by his will, dated the 6th of *September* 1763, gave and deviſed all his real and perſonal eſtate to *John Dennet* and *William Salkeld* and their heirs, upon truſt to pay the rents ariſing from his eſtate at *Wincanton* in the county of *Somerſet*, called *Pransfield's Aldermead* and the *Black Lyon* Inn, of all which he was ſeiſed in fee, to and for the education and maintenance of his nephew *William Gapper* during his minority, or for putting him apprentice, clerk, or in ſuch other manner, as ſhould be approved of by his executors; and afterwards upon truſt to permit him to receive the rents and profits thereof to his own uſe for ninety-nine years, if he ſhould ſo long live: but if he ſhould die before the expiration of ſaid term of ninety-nine years without lawful iſſue male living at his deceaſe, he gave the ſame to his nephew *James Gapper* for the reſidue of the ſaid term of ninety-nine years, if he ſhould ſo long live. The teſtator then among ſeveral other legacies gave 100*l.* to each of his ſaid nephews *William* and *James Gapper*; to be paid to them, if ever they ſhould attain the age of twenty-one years: otherwiſe to ſink into the reſiduum of the teſtator's perſonal eſtate; and he ordered the intereſt of 200*l.* due to him upon the *Wincanton* turnpike to be paid to *Anne Tarway* for the maintenance of *Peter Tarway Gapper*, his ſon by her, during the time ſhe ſhould continue ſingle, and to take care of him herſelf, or till he ſhould be put out apprentice or to ſome buſineſs, as his executors ſhould approve; and for which they are to aſſign any part of the ſaid 200*l.*: the reſidue to be paid to *Peter Tarway Gapper* at twenty-one or ſetting up his buſineſs; which ſhould be thought beſt; and the teſtator deſired, that all the reſidue of his money, whether due upon bond or otherwiſe, after payment of his juſt debts and funeral expences, and alſo all his houſehold furniture, plate, jewels, watches, books, and every ſpecies of goods and chattels, ſhould be ſold as ſoon after his deceaſe as poſſible; and that with the monies ariſing therefrom an eſtate ſhould be purchaſed by the ſaid *John Dennet* and *William Salkeld*, and ſettled in the ſame manner as his ſaid eſtate called *Pransfield's Aldermead* and the *Black Lyon* Inn were heretofore ſettled, in truſt for the uſes there and hereinafter mentioned: that is to ſay, to his nephew ſaid *William Gapper* for ninety-nine years, if he ſhould ſo long live; and after his deceaſe to his iſſue male; and in de-

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fault thereof for the reſidue of the ſaid term of ninety-nine years to his nephew ſaid *James Gapper*; and if both ſaid *William Gapper* and *James Gapper* ſhould happen to die without iſſue male living at their reſpective deaths and before ſuch iſſue male ſhould attain the age of twenty-one years, he deviſed all his eſtates in poſſeſſion and reverſion to be equally divided among all his ſiſters and their heirs for ever as tenants in common; and he appointed his truſtees executors.

By a codicil, dated the 2d of *November* 1764, the teſtator reciting ſeveral of the legacies given by the will diſpoſed of them to other perſons; and he gave to *Peter Tarway Gapper* the two legacies of 100*l.*; which were by the will given to the teſtator's nephews. The codicil then proceeded thus:

"And do alſo give all my eſtate called the *Black Lyon Pransfield* and *Aldermead* which were before given to my nephews "*William* or *James Gapper* unto my ſaid ſon *Peter* and his heirs "And I do alſo give every thing I had given by my ſaid will "unto either of my ſaid nephews *William* or *James Gapper* I do "now deviſe and give the ſame in as ample a manner to my ſaid "ſon *Peter* but if my ſaid ſon *Peter* ſhould happen to die before he "attained the age of twenty-one years and without iſſue then I "order the whole of this my codicil to be void and my will to be "and remain in full force Inſtead that I give to my maid ſervant "*Anne Tarway* a legacy of 50*l.* inſtead of the legacy of 20*l.* left "to her by my ſaid will:"

The teſtator then deſired *Peter Taylor* to act as truſtee in the room of *Salkeld.*

The teſtator died in *May* 1767. *Dennet* proved the will, and employed an attorney to act in the truſt; who finally ſettled the truſt account with him upon the 30th of *May* 1769; leaving a balance of 375 *l.* 3 *s.* 11½ *d.* in the hands of *Dennet* on account of the truſt. In 1772 *Dennet* died, having appointed *Richard Broderip* his executor and reſiduary legatee; who proved the will, and died in 1774, having appointed *Bennet Combe* his executor and reſiduary legatee. *Peter Tarway Gapper* having attained the age of twenty-one became a bankrupt in 1793.

The bill was filed in *January* 1797 by the aſſignees of the bankrupt againſt *Combe*; praying, that the ſaid balance on account of the perſonal eſtate of the teſtator *Gapper* may be paid to the plaintiffs, with intereſt from the time it came into the hands of *Dennet*; and that an account may be taken of the perſonal eſtate, debts, &c, of the teſtators *Gapper*, *Dennet*, and *Broderip*; and that, if the Court ſhall be of opinion, that the reſidue of *Gapper*'s perſonal eſtate ought to be laid out in land, it may be ſo laid out, &c.

As to the claim of intereſt, the following facts appeared upon the anſwer, and were admitted by agreement:

The defendant *Combe* had no notice of the demand till the year 1784. *Dennet* was the ſurviving truſtee. Aſſets were admitted. A doubt ariſing as to what eſtate *Peter Tarway Gapper* was entitled to under the will and codicil, the opinion of Mr. *Fearne* was taken in 1785; who adviſed, that a ſuit ſhould be inſtituted. Other opinions were taken. In 1787 the Solicitor for *Peter Tarway Gapper* took an opinion. Drafts of a bill and anſwer were prepared at the requeſt of the defendant's Solicitor. Then upon the bankruptcy various propoſals were made for indemnifying the defendant; and at laſt the ſuit was commenced.

The defendant by his anſwer ſtated, that he was always ready to pay the balance; but was adviſed, that he could not with ſafety on account of the oppoſite claims under the will; and ſubmitted, that he ought not to be charged with intereſt; eſpecially as except for a very ſhort time he had conſtantly ſince the death of *Broderip* had in the hands of his bankers more than the ſaid balance; out of which he would have paid it, if he had known it was due, and that he could have paid it with ſafety.

Mr. Graham and Mr. King for the plaintiff.—The firſt queſtion is, what eſtate the plaintiffs, as repreſenting *Peter Tarway Gapper*, are entitled to: whether the money is to be laid out in land or to be handed over to the plaintiffs in the right of *Gapper*, as being entitled to an eſtate in fee, or an eſtate-tail with no remainder over. The teſtator clearly meant to give a greater intereſt to this natural child by the codicil than he had by the will given to his nephews. He did not mean, that his nephews ſhould have the abſolute intereſt in the real eſtate or in that directed to be purchaſed. They were to take in ſucceſſion an intereſt for ninety-nine years, with a remainder in tail. By the codicil the natural ſon is ſubſtituted; and the real eſtate is given to him and his heirs. In the ſubſequent diſpoſition the words "in as ample a manner" refer, not to the manner, in which he had given to his nephews, but to the immediately preceding deviſe to his ſon.

As to the queſtion of intereſt, the defendant ought at leaſt to pay intereſt from the year 1784, when he had full notice. Perhaps it ought to be carried higher. Leaving money in his banker's hands is not a ſufficient excuſe (a). Why did he not carry the money to the Bank, and have it laid out?

Mr. Cox for the defendant contended upon the circumſtances of this caſe, that the defendant ought not to be compelled to pay intereſt.

Maſter of the Rolls.—I do not ſee the difficulty upon the firſt queſtion. I cannot ſee, how the intereſt given to *Peter Tarway Gapper* is limited by that of the nephews. The teſtator gave a limited intereſt to his nephews: but when he comes to give the very ſame eſtate to his natural ſon, he gives it to him and his heirs abſolutely; and then he gives every thing, he had given to his nephews by the will, "in as ample a manner" to his ſaid ſon; and the limitation over is to take place only in caſe of his death under the age of twenty-one and without iſſue.

Upon the ſecond queſtion, this being a fund to be laid out in land, and ſettled, the truſtee ought to have made it productive. But it cannot be carried higher than the year 1784. If the bill had been filed then, he would have had an eaſy road, and might have paid it into court.

Refer it to the Maſter to take an account of the perſonal eſtate, &c. and to compute intereſt upon the ſum of 375 *l.* 3 *s.* 11½ *d.* from the year 1784 at the rate of 4 *per cent.*; and to take an account of all ſums reaſonably and properly expended in the execution of the truſt.

(a) *Ante*, vol. 1. 90.

1798.
July 28th.

HUSON *v.* HEWSON.

A reference under the *Statute* 7 *Geo.* 2. *c.* 20. muſt proceed upon admiſſion of the principal and intereſt due upon the mortgage; and the Maſter cannot admit evidence.

THE bill was filed for forecloſure of a mortgage for the ſum of 392*l.* 4*s.* 3*d.*

The defendant applied by petition to the Maſter of the *Rolls* under the *Statute* 7 *Geo.* 2. *c.* 20; by which it is enacted, that upon a bill of forecloſure the Court upon application by the defendant, having a right to redeem, and upon admiſſion of the right and title of the plaintiff, may, before the cauſe ſhall be brought to hearing, make ſuch order or decree as the Court could have made, if the cauſe had been regularly brought to a hearing: Provided, the *Act* ſhall not extend to any caſe, where the perſon againſt whom the redemption is prayed, ſhall by writing, to be delivered, before the money ſhall be brought into Court, to the attorney or ſolicitor for the other ſide, inſiſt, either, that the party has no right to redeem, or that the premiſes are chargeable with other principal ſums than what appear upon the face of the mortgage, or ſhall be admitted upon the other ſide, or where the right of redemption ſhall be controverted by different perſons; nor ſhall be any prejudice to ſubſequent mortgagees or incumbrancers.

Upon the petition of the defendant under this *Statute*, ſtating, that the principal ſum had been reduced to 340 *l.*, and that the intereſt was paid up to the 4th of *Auguſt* 1792, a decretal Order was made at the *Rolls*; by which it was referred to the Maſter to take an account of what was due for principal, intereſt, and coſts.

The Maſter admitted evidence, that payments had been made on account of principal and intereſt; and upon that evidence, which was obtained by a Commiſſion iſſued into *Cumberland*, the Maſter ſtated by his Report, that there was due to the plaintiff upon the mortgage in the decretal order mentioned the principal ſum of 340*l.* only; and that the intereſt upon the ſaid mortgage was paid up to the 4th of *Auguſt* 1792.

Exceptions were taken to the Report: Firſt, that the Maſter certified, that there was due to the complainant upon the mortgage in the decretal Order mentioned the principal ſum of 340 *l.* only; whereas the Maſter ought to have certified, that there is due to the ſaid complainant upon the ſaid mortgage the whole of the principal ſum of 392 *l.* 4 *s.* 3 *d.* in the bill mentioned: the defendant having by ſuch Decree or decretal Order admitted, and the fact being, that the laſt mentioned principal ſum is due:

Secondly, that the Maſter found, that the intereſt upon the mortgage in the ſaid Decree or decretal Order mentioned had been paid up to the 4th of *Auguſt* 1792: whereas the Maſter ought to have found, that the whole of the intereſt from the 4th of *Auguſt* 1778 to the 18th of *November* 1794, when the ſaid complainant took poſſeſſion of the premiſes compriſed in the ſaid mortgage, remained due; and ought to have computed ſuch intereſt.

Attorney General for the exceptions.—The conſequence of the reference under this *Statute* is, that the defendant admits, that the principal and intereſt is due. Inſtead of proceeding upon that admiſſion the Maſter has permitted an examination by a Commiſſion into *Cumberland*. They have brought back large depoſitions, ſtating a great number of looſe converſations; from which it is contended, that part of the money due upon the mortgage has been paid. The object is to do away that admiſſion, which is the ground, upon which the Court by means of the *Statute* make the reference. Unleſs they agree in that admiſſion, the Court has no authority. The conſtant courſe is not to examine into the *quantum* of what is due.

Mr. Bell for the defendant contended, that under the *Statute* the inquiry is to be made as uſual.

Lord Chancellor.—I do not ſee, what anſwer there is to the *Statute*. I think, if it had been attended to, the Order ſhould not have been made. The ſtatement of the petition is, that only 340 *l.* is due. I do not know how to get rid of the objection, that the Maſter ought not to have inquired into the money due.

Allow the exceptions.

The *Solicitor General* being applied to by the Lord *Chancellor* ſaid, that if the defendant ſtopped the proceedings before anſwer, he muſt take the ſtatement of the bill to be true: if he litigates the fact, he may anſwer: then, where he has applied to ſtay proceedings, when the plaintiff was aware of the objection, and the plaintiff has not admitted it, and has offered an iſſue, the Court has in no inſtance made the Order.

PHELIPS *v.* CANEY (*a*).

July 31ſt.

Adminiſtrator diſputing by his anſwer the foundation of the bill, *viz.* a balance of accounts againſt the inteſtate's eſtate, need not ſet forth an account of the perſonal eſtate, &c. by way of ſchedule.

The bill was filed by an executor, againſt the adminiſtrators of an inteſtate: ſtating, that the teſtator and the inteſtate had croſs demands againſt each other; and that upon a balance of accounts, which were unſettled, a large ſum was due to the teſtator. The bill charged that the defendants as adminiſtrators had poſſeſſed aſſets of the inteſtate more than ſufficient to pay debts, including the plaintiff's demand; and prayed, that the defendants might admit aſſets or ſet forth an account by way of ſchedule.

The defendants by their anſwer diſputed the plaintiff's demand; and contended, that upon a balance of all accounts a large ſum, as they verily believe, would be found due to the defendants.

They farther ſtated, that the perſonal eſtate of the inteſtate was, as they believed, more than ſufficient for the payment of his debts and all claims upon his eſtate: but as the plaintiff's demand was not aſcertained, they did not admit aſſets; and they inſiſted, they were not bound to ſet forth any account by way of ſchedule; ſubmitting to be examined upon interrogatories, in caſe the plaintiff's demand ſhould be ſubſtantiated, and a balance ſhould appear to be due to him.

Exceptions were taken to the anſwer for not ſetting forth the account of the inteſtate's perſonal eſtate and of his debts.

The Maſter diſallowed the exceptions; and reported the anſwer to be ſufficient to a common intent.

Exceptions were taken to the Maſter's report.

(*a*) *Ex relatione.*

Solicitor General and *Mr. Johnſon for the exceptions.*—*Mr. Stanley for the report.*

The exceptions were overruled (*a*).

(*a*) See *Marquis of Donegal* v. *Stewart*, *ante*, vol. 3. 446.

July 31ſt.

PERRY v. PHELIPS.

PERRY v. SMITH.

Truſtee for the purchaſe of land died without perſonal aſſets, but having purchaſed land: the eſtates purchaſed were held not liable to the truſt: the circumſtances affording no preſumption, that they were purchaſed in execution of the truſt.

JOHN LOCKYER, being ſeiſed in fee of real, and poſſeſſed of perſonal, eſtate, by his will, dated the 13th of *June* 1734, deviſed his lands and hereditaments, (ſubject to ſome annuities long ſince expired,) unto his brother *Thomas Lockyer*, until his ſon *John* or any other of his younger ſons ſhall attain twenty-one; which ſhall firſt happen: in caſe he ſhall have no younger ſon, that ſhall live to attain the ſaid age, then until ſuch only ſon ſhall attain the ſaid age; in truſt, that the clear rents, iſſues and profits, of the premiſes (after all charges and reparations deducted), except a dwelling-houſe at *Ilcheſter* and the gardens and orchard thereto belonging, which the teſtator directed to be enjoyed by him for his own uſe for the term above mentioned, be preſerved and improved, and the ſame with the produce thereof be laid out and employed in manner as hereinafter directed with regard to the overplus of his perſonal eſtate; and when and as ſoon as his ſaid nephew *John Lockyer* or any other of the younger ſons of his ſaid brother *Thomas Lockyer* born or to be born ſhall attain twenty-one, then he gave his ſaid dwelling-houſe, orchard, and gardens, and all other his ſaid lands and hereditaments thus charged as aforeſaid unto his ſaid nephew *John Lockyer*, or unto ſuch other, as for the time being ſhall be a younger ſon of his ſaid brother, and ſhall firſt attain the age of one-and-twenty years, and to the heirs and aſſigns of ſuch reſpective younger ſon for ever: but if his ſaid brother ſhall have but one ſon, that ſhall live to attain the ſaid age, then the teſtator gave the ſame unto ſuch only ſon, his heirs and aſſigns for ever. The teſtator then reciting, that his brother *Thomas* and his eldeſt ſon, *Joſeph Tolſon Lockyer* or one of them was entitled to the fee-ſimple or other eſtate of inheritance in lands called *Cheſter Meads* in the county of *Somerſet*, directed, that if his ſaid brother, or his ſon *Joſeph*, or ſuch as ſhall have a legal title thereto, ſhall convey the ſaid lands to the ſame uſes, intents and purpoſes, as near as may be, as the teſtator's ſaid lands and hereditaments are hereby deviſed, that there be paid to the ſaid *Joſeph Lockyer*, or to ſuch, in whom the ſaid premiſes ſhall be then veſted, and ſhall execute ſuch conveyance, the ſum of 3000*l.* out of his perſonal eſtate in lieu of the lands to be thus conveyed and ſettled, as aforeſaid; and as to his perſonal eſtate, after his debts, legacies and funeral expences deducted, he gave the ſame to his ſaid brother *Thomas Lockyer*, whom he made his executor, in truſt, that he improve the ſame in the beſt manner, as he ſhall think proper, until ſuch ſon as will be entitled to his lands ſhall attain the age of one-and-twenty years; and then to lay out the ſame and the produce thereof in the purchaſe of other lands of inheritance, and do ſettle and aſſure ſuch new-purchaſed lands to and for the ſame uſes, intents and purpoſes, as near as may be, as his lands and hereditaments are deviſed; and he declared his will, that no part of the eſtate thereby deviſed be applied to the maintenance or education of his ſaid brother *Thomas*'s ſons during their nonage; but that his brother be at the ſole charge of ſuch their maintenance; and in caſe his ſaid brother *Thomas* ſhall have no ſon, that ſhall attain the age of one-and-twenty years, then he gave unto his niece *Betty Cleeve* the ſum of 500*l.* And all the reſidue of his eſtate both real and perſonal he gave unto his ſaid brother *Thomas*, his heirs, executors and adminiſtrators.

The teſtator died in *November* following; leaving his brother *Thomas* his heir at law, and *Joſeph Tolſon Lockyer* and *John Lockyer*, the two ſons of *Thomas Lockyer* then living. *John Lockyer*, the younger ſon of *Thomas*, died in 1751 under the age of twenty-one; upon which *Joſeph Tolſon Lockyer* became, and continued till his death, the only ſon of *Thomas Lockyer*. In 1752 he married; and by his will, dated the 26th of *September* 1759, he deviſed in the following terms:

“ As to ſuch worldly eſtate of what nature or kind ſoever whe-
“ ther in poſſeſſion reverſion or remainder wherewith it hath
“ pleaſed God to intruſt and that I ſhall die ſeiſed or poſſeſſed of
“ intereſted in or entitled unto inveſted in or that ſhall belong to
“ me at my deceaſe whereſoever or howſoever in any manner or
“ wiſe the debts which I ſhall owe at the time of my deceaſe and
“ my funeral charges and expences being thereout firſt deducted
“ paid and ſatisfied I do give deviſe and bequeath the ſame and

"every part and parcel thereof fully wholly and abſolutely unto "my dear wife *Maria Lockyer* to be by her her heirs executors ad- "miniſtrators and aſſigns peaceably and quietly held occupied and "enjoyed for ever free from the claim or demand of any other "perſon or perſons out of from or to the ſame or any part thereof:"

He appointed his wife ſole executrix; and he died in *January* 1764.

Thomas Lockyer upon the death of his brother *John Lockyer* entered upon and took poſſeſſion of his real and perſonal eſtate. *Joſeph Tolſon Lockyer* having attained the age of twenty-one upon the 15th of *February* 1749 was by his father put into poſſeſſion of the houſe, garden, and eſtate, of the teſtator *John Lockyer*: but a ſhort time afterwards *Thomas Lockyer* re-entered on the ſaid eſtates; and continued in poſſeſſion and receipt of the rents and profits and produce of the real and perſonal eſtates of the teſtator *John Lockyer* till his death in *July* 1785. By his will, made ſhortly before his death he gave all his real and perſonal eſtate to his executors, upon truſt to pay the intereſt, dividends, and produce of the perſonal eſtate and the rents and profits of the real to the ſeparate uſe of his daughter *Mary Smith* for life; and upon her deceaſe, as to the perſonal eſtate, to pay the principal to her children according to her appointment, if more than one: in default of appointment, equally; and if but one, to that one; and on the deceaſe of his daughter he gave, deviſed, and bequeathed, his real eſtate to her ſon *Thomas Smith*, his heirs and aſſigns for ever.

The widow of *Joſeph Tolſon Lockyer* married —— *Perry*; and they filed the bill, claiming under the will of *Joſeph Tolſon Lockyer*, againſt the deviſees of *Thomas Lockyer*, and againſt *Edward Williams*, heir at law of the teſtator *John Lockyer*, of *Joſeph Tolſon Lockyer* and *Thomas Lockyer* (*a*).

By the decree made upon the 29th of *January* 1790 by Mr. Juſtice *Buller*, ſitting for the Lord *Chancellor*, the wills of *John*

(*a*) See the firſt points, that aroſe in this cauſe, *ante*, vol. 1. 251; where it was determined, 1ſt, that the intereſts given by the will of *John Lockyer* in truſt for the youngeſt or only ſon of *Thomas Lockyer* attaining the age of twenty-one veſted by executory deviſe in *Joſeph Tolſon Lockyer*, the only ſurviving ſon, upon his attaining that age, liable to be deveſted by the birth of another ſon:

2dly, That the rents and profits of the real eſtate accrued after *Joſeph Tolſon Lockyer* made his will, being part of the truſt fund directed to be laid out in land, were an equitable intereſt in land, and therefore paſſed by that will to his deviſee.

1798.

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Lockyer the elder and *Joſeph Tolſon Lockyer* were eſtabliſhed; and it was referred to the Maſter to take an account of the perſonal eſtate of the teſtator *John Lockyer*, and of the rents and profits of his real eſtate accrued ſince his death, received by *Thomas Lockyer* in his lifetime, or by *Edward Phelips* and *Samuel Smith* ſince his death, or any of them, *&c*; and the Maſter was directed to inquire, whether *Thomas Lockyer* received any and what ſums of money for fines upon renewing the leaſes of any and what eſtates of *John Lockyer*, the teſtator: an account was directed of the perſonal eſtate of *Thomas Lockyer*, and of the debts, legacies, and funeral expences, of *John Lockyer*; and an application of his perſonal eſtate in the payment of his debts, *&c*, in a courſe of adminiſtration; and the Maſter was to inquire, in what manner *Thomas Lockyer* paid, applied, and diſpoſed of, the perſonal eſtate and the rents and profits of the real eſtate, and the money received by fines and renewing the leaſes of *John Lockyer*'s eſtate; and whether he laid out or inveſted the ſame or any part thereof in the purchaſe of any and what eſtates; and particularly it was ordered, that the Maſter ſhould inquire, what eſtates *Thomas Lockyer* purchaſed after *Joſeph Tolſon Lockyer* attained the age of twenty-one: but without prejudice; and the uſual directions were given for taking the accounts and diſcovery of the matters aforeſaid; and that all deeds and writings relating to the freehold and leaſehold eſtates of *John Lockyer* deviſed to the plaintiff by the will of *Joſeph Tolſon Lockyer* ſhould be delivered to the plaintiff upon oath; and it was ordered, that all deeds and writings, relating to the eſtates purchaſed by *Thomas Lockyer* ſince the year 1750, in the cuſtody or power of any of the parties, ſhould be produced by them before and left with the Maſter upon oath; and intereſt, coſts, and farther directions were reſerved.

This cauſe was reheard at the petition of the defendants upon the following points:

1ſt, As to the direction to take an account of the rents and profits of the real eſtates of the teſtator *John Lockyer* accrued ſince his death, received by *Thomas Lockyer* and the defendants *Phelips* and *Smith* ſince his death; whereas *John Lockyer* by his will directed, that his dwelling-houſe at *Ilcheſter* ſhould be enjoyed by his brother, until his ſon *John Lockyer* or any other younger ſon, or an only ſon, ſhall attain twenty-one; which therefore ought to be excepted:

2dly, As to the general account directed of the rents and profits of the real eſtate of the teſtator *John Lockyer* accrued ſince his death, received by *Thomas Lockyer*, and by the defendants ſince his death: the petitioners inſiſting, that the rents and profits of the real eſtate of *John Lockyer* accrued after *Joſeph Tolſon Lockyer* attained twenty-one in the lifetime of *Thomas Lockyer* are not diſpoſed of by the will of *John Lockyer*; and belonged to *Thomas* as heir at law.

3dly, As to the direction to inquire, what eſtates *Thomas Lockyer* purchaſed, after *Joſeph Tolſon Lockyer* attained twenty-one: the petitioners contending, that there was no ground for directing ſuch inquiry:

4thly, As to the direction, that all deeds and writings relating to the eſtates purchaſed by *Thomas Lockyer* ſince the year 1750 in the cuſtody of any of the parties ſhould be produced before the Maſter: the petitioners inſiſting, that the plaintiff has no right to ſuch production; particularly as the ſame belong to perſons, who have purchaſed ſuch eſtates, and are become legally entitled thereto by ſettlement, and are not parties to the ſuit.

By an order made on the 3d of *Auguſt* 1790 upon the petition of rehearing it was ordered, that the decree ſhould be varied ſo far as it related to the account of the rents and profits of the dwelling-houſe, garden, and orchard, at *Ilcheſter*, mentioned in the will of the teſtator *John Lockyer*, from the time of his death; and it was ordered, that ſuch account ſhould be taken from the time of the death of *Thomas Lockyer* only; and with this variation the decree was affirmed.

The Maſter by his general report, dated the 8th of *Auguſt* 1797, ſet forth ſeveral eſtates purchaſed by *Thomas Lockyer*; ſtating the annual value of each; and diſtinguiſhing between thoſe purchaſed before the 15th of *February* 1749, when *Joſeph Tolſon Lockyer* attained twenty-one, and thoſe purchaſed afterwards. He ſtated, that no evidence had been produced before him of the prices paid for the purchaſe of any of the ſaid eſtates: or whether ſuch purchaſe-money or any part thereof was paid by *Thomas Lockyer* out of the perſonal eſtate of the teſtator *John Lockyer* or the rents of his real eſtate or either of them: but he found that *Thomas Lockyer* was in his lifetime in the habit of laying out to the moſt advantage the moneys, which came to his hands, in Government ſecurities,

ties, or mortgages, or in the purchaſe of lands, as opportunity offered.

The cauſe coming on for farther directions, the queſtion was, whether the deficiency of the perſonal eſtate of *Thomas Lockyer* to anſwer the account of the rents and profits and produce of the real and perſonal eſtate of the teſtator *John Lockyer* ſubject to the truſts of his will ſhould be made good out of the real eſtates purchaſed by *Thomas Lockyer*.

Attorney General, Mr. Mansfield, and Mr. Fonblanque for the plaintiff.—The rule, that *Ceſtuy que truſt*, where a truſtee having received money dies, is a creditor by ſimple contract only, does not apply, where the truſtee is under an obligation to lay out the money in land. *Sowden* v. *Sowden*, 1 *Bro. C. C.* 582. has determined, that where a man is bound to do an act, and he does what may enable him to do the act, it ſhall be taken to be done by him with the view of doing that, which he was bound to do. This caſe is not ſtronger than that. Truſtees were there to be interpoſed, and other acts to be done: but there was no interpoſition with or advancement to the truſtees; and it was decided upon the moral principle, that he ſhall be intended to diſcharge the obligation. *Lechmere* v. *Lechmere*, *For.* 80. is very ſtrong to the ſame point. There is no difference in that caſe, but that the ſum was certain: in this it is a balance in the hands of *Thomas Lockyer* ariſing from the eſtate of his brother. He was to lay it out himſelf: no truſtee was interpoſed: no intervening act was to be done. He receives the rents and profits during the minority of his ſon; and he was bound from the moment that ſon came of age to lay out the fund in land. Having this money in his hands he does purchaſe land. It is aſcertained, that he did purchaſe eſtates after his ſon came of age. If this doctrine cannot be maintained, the money will be loſt. There is no fund without reſorting to the real eſtate. There ought to be an inquiry, what ſums of money he had in his hands; and the real eſtate ought to be anſwerable for ſo much as the perſonal eſtate is deficient.

Solicitor General and Mr. Cox for the defendants.—*Lechmere* v. *Lechmere* and *Sowden* v. *Sowden* are upon a totally different principle: *viz.* that where a man dies inteſtate, as between the perſons entitled to his real and perſonal eſtates, taking by devolution from him what the law would give them, the heir ſhall not take the benefit of a contract entered into for converſion of perſonal into real eſtate, at the ſame time taking by deſcent that real eſtate, with which, it was to be preſumed from the circumſtances, the covenant was intended to be performed. In *Sowden* v. *Sowden* the difficulty aroſe from the terms of the ſettlement; for if it had been ſimply a covenant to lay out money in land, without more, it would have been preciſely the caſe of *Lechmere* v. *Lechmere*. The Maſter of the *Rolls* had no conception, that if the eſtate had been deviſed, he could have made it reſponſible otherwiſe than as it was aſſets bound by the covenant: but he took it, that as no actual diſpoſition was made of the property, it was to be preſumed, the intention was to perform the covenant. Could it be conſidered upon that caſe, that the lien was to defeat other ſpecialty creditors or judgment creditors? It was not argued, or thought of. This therefore cannot apply to the caſe of a truſtee having money in his hands; which he is to lay out, as opportunity ſhall offer, in the purchaſe of land. No ſuch caſe is to be found. *Sowden* v. *Sowden* decides nothing but as between real and perſonal repreſentatives upon an inteſtacy. It is ſaid, Lord *Thurlow* decided, that the attainment of the age of twenty-one by the ſon of *Thomas Lockyer* was the time, at which the money was to be laid out in land. The decree has no ſuch deciſion. An inquiry was preſſed for. It did not appear, what the circumſtances were; or whether there were perſonal aſſets, or not. *Thomas Lockyer* would not have acted according to his truſt, if he had laid out the fund during his life. According to the will it might have been laid out by his executors after his death. From the deciſion upon the rehearing, that *Thomas Lockyer* was entitled to the houſe at *Ilcheſter* during his life, as it could not be aſcertained, whether there would be a younger ſon, or whether *Joſeph Tolſon Lockyer* would be entitled, it is clear, that, as long as *Thomas Lockyer* lived, there was no truſt to lay out the money in land. He acted upon the idea, that he was owner of the rents and profits during his life. From his ſubſequent conduct it cannot be ſuppoſed, that he intended to do this. At leaſt it is neceſſary, that the thing done ſhall perfectly tally in all its parts with that, which the party is bound to do. Suppoſe, the obligation was to lay out the money in lands in *Oxfordſhire*, and he had purchaſed lands in *Buckinghamſhire*: ſuppoſe, he was bound to do it at the end of one year; and he did it another time: could the Court raiſe the preſumption of an intention to execute the truſt? This therefore is the common caſe of a perſon dying without aſſets, who has in his life laid out large ſums of money in real eſtates. The Court has often lamented, that in ſuch caſes the real eſtate is not anſwerable: but ſuch is the Law; and there is no Equity upon the ſubject. Suppoſing it to have been a truſt in *Thomas Lockyer* to lay out this money, it muſt be inquired, whether theſe purchaſes are for the benefit of the objects of the truſt. The Court cannot hold aſſets to be bound in this way. If the purchaſe is not expreſsly for the purpoſe of the truſt, there is nothing, upon which that intention can be preſumed; and then the only queſtion is, whether property not ſubject to a debt in its nature ſhall be made ſo.

Lord CHANCELLOR.—The point for the plaintiff requires a much broader principle, than they chooſe to ſtate. They only make their demand for the deficiency of the perſonal aſſets: but their principle will go to all the purchaſes; if they can trace the money in his hands at the time. They muſt aſſert this, that in all caſes, where there is a truſtee of money to be laid out in land, if he buys land, that muſt be conſidered as done in execution of his truſt. Then they muſt claim all the land, he has purchaſed from the time they ſuppoſe him clothed with the truſt. All the money, that came into his hands, they muſt ſay, is the price of the land; and that he bought it in execution of his truſt.

Attorney General in reply.—We have a right to conſider it ſo. I cannot ſtate any authority except thoſe, that have been mentioned: but there is no authority againſt it. The general caſes have been, that when a truſtee has money in his hands upon a perſonal truſt, and lays it out in land, you cannot follow that land, except under ſome very particular circumſtances. In *Lechmere* v. *Lechmere* not one of the circumſtances occurs, which are now apprehended to be neceſſary. The purchaſes were not made with the ſum of 24,000 *l.* nor with the other ſum of 6000 *l.*, but with different ſums from time to time, not in the aggregate making up that ſum of 30,000 *l.*; and even between ſuch creditors as repreſentatives, between whom your Lordſhip has been in the habit of ſaying there is no Equity (*a*), yet between ſuch parties the co-

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(*a*) See *Chitty* v. *Parker*, *ante*, vol. 2. 271. and the caſes there cited, and *Halliday* v. *Hudſon*, *ante*, vol. 3. 210.

venantor ſhall be underſtood to intend to ſatisfy his covenant; if the act is one, whereby his covenant can be ſatisfied. Even though the perſon claiming the perſonal eſtate does not ſtand in the character of a creditor, yet it ſhall be ſo held againſt the heir. Lord *Kenyon*, I admit, made the deciſion at the *Rolls* with great reluctance. The principle, as it is handed to us by the Report, has nothing to do with the character of the party: but the principle is, that where a man is bound to do an act, and does what may enable him to do it, he ſhall be taken to do that in performance of what he is bound to do; and that between repreſentatives. It is ſtronger in favor of a *bonâ fide* creditor than of a mere volunteer. When once a ſon attained the age of twenty-one, it is impoſſible to deny, that there was a ſon, who by himſelf or his repreſentatives could take. If *Thomas Lockyer* was not bound to lay out the fund during his life, neither was his executor; for then the ſon attaining the age of twenty-one was the only perſon intereſted; and would take the money. I agree, I am bound to go the whole length of ſaying, I have a right to claim the land and to claim all the rents and profits of the land; which does create great difficulty: but that depends upon the former conſideration; whether the principle I have ſtated, that being under an obligation he ſhall be taken to mean to execute it, does exiſt. It is very difficult for a Court of Juſtice to refuſe the conſtruction of theſe caſes, if they hold him to have been under an obligation.

Lord CHANCELLOR.—Lord *Lechmere* was under an acknowledged engagement by his own act. Before you come at your preſumption, you muſt make out, that *Lockyer* felt himſelf to be under that obligation.

I wiſh, I could adopt your principle; for if I could go ſo far, I could go a great way farther; and it would not be undeſirable to get to that point; for I ſhould hold, that all real eſtates purchaſed by a man indebted were aſſets for the payment of his ſimple contract debts. He is under a moral obligation to pay his ſimple contract debts, and to diſpoſe of his property ſo as that his creditors may have acceſs to it. If he purchaſes land, he is under an obligation to charge that land with his debts. The caſe before the Maſter of the Rolls, which you ſay was determined upon great conſideration, ſeems to me to go upon a very obvious and clear preſumption. The party was under an obligation to lay out 2000*l.* in a purchaſe of land. He lays out in the purchaſe of land 2150*l*. You will hardly get a nearer purchaſe to the ſum of 2000*l*. The daughter claimed, not as a volunteer, but a daughter, who, if ſhe could not raiſe the preſumption, and the land was not to be held to have been purchaſed in performance of the obligation, had a right as a creditor to have the ſum of 2000*l*. raiſed out of the perſonal eſtate. The benefit, that aroſe to her from fixing the charge upon the land purchaſed, was perfectly contingent. It left the perſonal eſtate more free. The ground of the determination was, that he muſt be preſumed in making the purchaſe to have intended to fulfil his obligation. I can find no caſe, no authority or principle, that enables me, where there is not a ground of preſumption, where in point of fact I muſt be ſatisfied, the party did not mean to execute the truſt or conceive himſelf to be under a truſt, to hold, that the eſtate, he purchaſed, is ſubject to the truſt. I admit, he was under a truſt; and if I had been to determine upon the conduct of Mr. *Lockyer*, this Court would have taken care, that the rents and profits ſhould have been laid out in land; and more than that, would have taken care, that he was improving the eſtate during the time he was to have the rents and profits. But it is clear, he conceived himſelf entitled to the rents and profits. He acted upon it; taking upon himſelf the purchaſe of the eſtates; and I cannot raiſe the preſumption in oppoſition to the fact; eſpecially as in the caſe relied on the purchaſe made was within a trifle of the preciſe ſum, the party was bound to lay out.

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Aug. 2d.

Teſtatrix by will appointed an executor, and gave him a legacy: afterwards by a teſtamentary paper ſhe directed the reſidue to be diſpoſed of according to private inſtructions to him; and having by a ſubſequent codicil added another executor died without giving any inſtructions: the executors are truſtees of the reſidue for the next of kin.

The teſtatrix by her will appointed the defendant *Huſſey* her executor; and gave him a legacy.

Afterwards by a teſtamentary paper, which was proved in the Eccleſiaſtical Court, the teſtatrix directed the reſidue of her perſonal eſtate to be diſpoſed of according to private inſtructions to her executor *Huſſey*.

By a ſubſequent codicil ſhe appointed the defendant *Dennet* to be one of her executors.

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The cauſe coming on for farther directions upon the report of the Maſter under a decree to take the uſual accounts, the defendant *Dennet* ſet up a claim on behalf of himſelf and his co-executor to the reſidue; the teſtatrix having given the defendant *Huſſey* no inſtructions with reſpect to it.

Mr. Sutton for the next of kin, admitted, that a legacy to one of two executors would not defeat their right to a reſidue undiſpoſed of; but inſiſted, that the teſtamentary paper ſhewing an intention to make a future diſpoſition of the reſidue, which was not completed, turned the executors into truſtees for the next of kin.

Mr. Johnſon for the defendant Dennet.—This caſe is diſtinguiſhed by this circumſtance; that one of the executors is appointed by an inſtrument ſubſequent to that, which diſcovers an intention to diſpoſe ſpecifically of the reſidue. That purpoſe might have been abandoned, when the teſtatrix made the laſt codicil. In *Bennet* v. *Batchelor*, 3 *Bro. C. C.* 28. *ante*, vol. 1. 63. Lord *Thurlow*'s language ſeems to infer, that the appointment of the executor and the diſpoſition, that defeats his claim, muſt be by the ſame inſtrument.

Lord CHANCELLOR.—This inſtrument is proved as a teſtamentary paper. Upon the whole diſpoſition, the teſtatrix has made, ſhe has reſerved an ulterior diſpoſition of the reſidue. That ulterior diſpoſition being either not made, or not known to be made, of courſe the executors can claim nothing (*a*).

(*a*) *Biſhop of Cloyne* v. *Young*, 2 *Veſ.* 91. *Nourſe* v. *Finch*, 4 *Bro. C. C.* 239; *ante*, vol. 1. 344. vol. 2. 78. *Starkey* v. *Brooks*, 1 *P. Will.* 390. *White* v. *Evans*, *ante* 21.

MATTHEWS *v.* WALLWYN.

Feb. 10th,
March 13th,
Aug. 6th.

Aſſignment of a mortgage without the privity of the mortgagor: the aſſignee takes ſubject to the account between the mortgagor and mortgagee.

A ſettled account between attorney and client opened upon general allegations by the client of error, admitted; though no ſpecific errors were pointed out.

THOMAS MATTHEWS being tenant for life of real eſtates applied to *Wallwyn Shepheard*, who was his ſolicitor, to procure him the ſum of 2000*l.* *Shepheard* accordingly procured *John Baker* to advance that ſum upon the mortgage of the eſtates, of which *Matthews* was tenant for life, and an aſſignment of a policy of

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inſurance for 2000*l.* made by *Matthews* for his life in *January* 1788. That mortgage and aſſignment, dated the 20th of *May* 1788, were executed accordingly to *Baker*, his executors, adminiſtrators and aſſigns, for ninety-nine years, if *Matthews* ſhould ſo long live, ſubject to redemption; with a covenant, that *Matthews* would keep the ſaid ſum of 2000*l.* inſured for his life.

Baker having been afterwards paid by *Shepheard*, *Matthews* gave *Shepheard* a bond for 2000*l.*, dated the 25th of *March* 1791; and by indentures of the ſame date the mortgage and the policy of inſurance were aſſigned to *Shepheard*. In *January* 1792 *Shepheard* borrowed from *Hercy* and Co., bankers, the ſum of 2000*l.*; and on that occaſion he depoſited with them the indentures of the 20th of *May* 1788 and the 25th of *March* 1791 and the bond and the policy of inſurance, and a note under his hand, declaring, that the ſaid inſtruments were depoſited as a ſecurity for that ſum with intereſt. In *March* 1794 *Hercy* and Co. calling for repayment, *Shepheard* applied to *Wallwyn* and Co., bankers, to open an account with him; requeſting them to lend him 2000*l.*; and propoſing to depoſit the deeds and ſecurities then in the hands of *Hercy* and Co. as a ſecurity; and repreſenting, that it would be neceſſary to have part of ſuch moneys for the purpoſe of redeeming them, before he could deliver them to *Wallwyn* and Co. They conſented to open an account with him, and to advance or give him credit for the ſum of 2000*l.* upon the propoſed ſecurity and the farther ſecurity of his note. On the 21ſt of *March* 1794 they advanced him the ſum of 1000*l.* for the purpoſe of redeeming the ſecurities; and upon the 24th of *March* he depoſited all the ſaid ſecurities with them; and gave them his promiſory note at three months for 2000*l.* and intereſt; and he wrote a note declaring the purpoſe of the depoſit. Afterwards, before the 24th of *June* 1794 he drew upon them to the amount of 1431*l.* 9*s.* 4*d.* excluſive of the 1000*l.*, originally advanced. They received upon his account only 600*l.*; and upon the 24th of *June* 1794, when his note became due, the balance due to *Wallwyn* and Co. was 1856*l.* 13*l.* 5*d.* In *January* 1795, *Shepheard* became a bankrupt. By indentures, dated the 29th of *September* 1797, executed in purſuance of a decree made at the Rolls upon the 14th of *June* 1797 upon a bill filed by *Wallywn* and Co. in *December* 1794, the aſſignees of *Shepheard* aſſigned all the ſaid ſecurities to the plaintiffs in that cauſe. *Matthews* was made a defendant in that ſuit: but before

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before the hearing the plaintiffs had the bill as againſt him diſmiſſed with coſts.

Shepheard as the attorney and ſolicitor of *Matthews* was in the habit of receiving and paying large ſums of money upon his account; and the premiums upon the policy of inſurance were paid by him, and charged in account with *Matthews*. Upon the bankruptcy of *Shepheard*, *Wallwyn* and Co. paid one premium upon that policy, which became due in *January* 1795. By an account ſettled and ſigned by *Matthews* and *Shepheard* upon the 11th of *October* 1794 a balance of 4400*l.* appeared due to *Shepheard*. *Matthews* had no notice of *Shepheard*'s tranſactions with *Hercy* and Co. and *Wallwyn* and Co. as to the ſecurities aſſigned to him by *Matthews*, till the bill was filed againſt him in *December* 1794.

This bill was filed by *Matthews* againſt *Wallwyn* and Co. and againſt the aſſignees of *Shepheard*, who was dead; praying, that the aſſignees of *Shepheard* may be decreed to come to a fair ſettlement of accounts depending between the plaintiff and *Shepheard*; and that the plaintiff may be at liberty to redeem the mortgaged premiſes, if any thing ſhall appear to be due from him upon the ſettlement of accounts in reſpect of the ſaid mortgage; and that the defendants *Wallywn* and Co. may re-convey and re-aſſign to the plaintiff the mortgaged premiſes, and deliver up the ſaid ſecurities to be cancelled; and that they may be reſtrained by injunction from proceeding at law: the plaintiff offering to pay what, if any thing, ſhall appear to be due from him upon the aforeſaid ſettlement of accounts on account of the ſaid mortgage.

The bill charged, that the plaintiff having been informed by ſome of *Shepheard*'s friends, that he was in an embarraſſed ſituation, but that if the plaintiff would give him a ſecurity for the balance then due to him, it would be of infinite ſervice to him in enabling him to ſettle with his creditors, and the plaintiff being willing to aſſiſt *Shepheard*, and imagining himſelf to be more in debt to him than he really was, promiſed to do ſo, when the account ſhould be properly made out and ſettled. In a few hours *Shepheard* produced an account, and requeſted the plaintiff to ſign it; and the plaintiff did ſign it at his earneſt ſolicitation, and upon his agreeing to permit the plaintiff to take it into the country for the purpoſe of examining it and making ſuch alterations,

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as ſhould be proper. The plaintiff has ſince diſcovered, that *Shepheard* previous thereto had received for the plaintiff's uſe divers ſums of money, for which he had not given the plaintiff credit in the account; and that if ſuch ſums together with ſeveral ſums received by him ſince ſigning the account were deducted, a conſiderable balance would be due to the plaintiff; eſpecially as he has alſo diſcovered, that ſeveral ſums, with which he was charged in the account, as having been paid by *Shepheard*, were not paid by him.

The defendants *Wallywn* and Co. by their anſwer ſubmitted, that *Shepheard* being the plaintiff's attorney was ſufficient notice to him; and that they are entitled to a ſpecific lien upon the mortgaged premiſes and ſecurities in reſpect of the ſum of 1856*l.* 13*s.* 5*d.*, the balance due to them from *Shepheard* upon the 24th of *June* 1794; whether the ſaid ſum of 2000*l.* was or was not due from the plaintiff to *Shepheard*, when the defendants advanced the ſaid 2000*l.* upon the ſaid ſecurities; or whether the ſame was or was not afterwards ſatisfied or paid to *Shepheard* by the plaintiff, or by reaſon of moneys received by *Shepheard* upon his account; and that they ought not to be reſtrained from proceeding by ejectment to recover poſſeſſion.

The aſſignees of *Shepheard* by their anſwer ſubmitted to account.

The cauſe was heard upon bill and anſwer. When it was firſt opened, the Lord *Chancellor* directed it to ſtand over, that it might be formally argued; conſidering the point to be new, and of great importance, as it might affect the general credit of mortgages.

Solicitor General and Mr. Richards for the plaintiff.—It is a ſettled principle, that the aſſignee of a mortgage can be in no better ſituation than the mortgagee. Upon inquiry as to the practice in the Maſter's office it appears, that in the account between the mortgagor and mortgagee the Maſter takes into conſideration, what is the real debt; and if the mortgagee has received money collaterally, the mortgagor ſhall have credit for it. According to a manuſcript note of *Lunn* v. *St. John*, Lord *Thurlow* expreſſed a ſtrong opinion upon this point againſt the mortgagor; though it does not amount to a deciſion. An account was directed of what was due at the time of the mortgage, what was due at the

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the time of the aſſignment, and what remained due (a). Conſider the caſe of a *Weſt India* mortgage. Payments on that account are uſually made by bills upon this country at long dates and by inſtalments. It is not the practice upon the receipt of each bill to indorſe that upon the mortgage deed. There is a dealing between the mortgagor and mortgagee; in conſequence of which the debt is much reduced: it is always conſidered, that the account is to be taken upon the foot of the tranſactions between the parties. There is no caſe to be found *in terminis* like this: but it is impoſſible upon principle not to ſee, that the aſſignee is affected by all the Equity, that affects the mortgagee. It muſt be known, that the mortgage is only a ſecurity for a debt. It has never been doubted, that the aſſignee has no right to call upon the mortgagor for intereſt, which he has paid to the mortgagee. The mortgagor may in the account with the aſſignee take advantage of payments of intereſt to the mortgagee, though the aſſignee has no notice. In 1 *Eq. Ca. Ab.* 328. tit. *Mortgage* it is laid down, that if a mortgagee in poſſeſſion aſſigns without the aſſent of the mortgagor to an inſolvent perſon, the mortgagee is bound to anſwer the profits both before and after the aſſignment. The *Quære* there proves the principle of the caſe. In the ſame book it is held, that if a mortgagee aſſigns, he muſt be a party to a bill of redemption; that he may account for the profits, he has received. That ſhews, he has not diſcharged himſelf from all connection with the mortgagor by aſſigning the mortgage. There is another caſe to ſhew, that an account between the mortgagee and the aſſignee will not conclude the mortgagor; but there muſt be an inquiry, what was due at the time of the aſſignment. The aſſignee therefore is to be bound by the receipts and payments, and by the Equity of the mortgagor.

In this caſe a ſimilar courſe to that adopted in *Lunn* v. *St. John* ought to be taken. An account muſt be directed of what was due to *Shepheard* at the time of the aſſignment to him; and what was due at the time the plaintiff had firſt notice of the aſſignments, *Shepheard* made; which was by the bill filed in 1794. The plaintiff was dealing with *Shepheard* under the idea, that he was the perſon, who had a right to call for what was due upon the mortgage. He was the confidential attorney of the plaintiff. The aſſignment to the defendants was merely equitable, by a depoſit of the ſecurities.

(a) See this caſe and the final deciſion of it particularly ſtated in the judgment.

Will the mere circumſtance of their having now got the legal eſtate give them a right to have the mortgage-money paid over again? It was by their fault, in neglecting to give the plaintiff notice, that *Shepheard* received payments on his account. A ſingular caſe may ariſe, if the plaintiff is not right. If the defendants had applied upon the bond, which was alſo depoſited with them by *Shepheard*, they muſt have been affected by all the Equity, that bound him: then it would be extraordinary, where both ſecurities are for the ſame thing, and the mortgage is conſidered only as a collateral ſecurity, that the principal inſtrument, the bond, ſhall not avail the defendants at all, or at leaſt not for more than what is juſtly due, but if he chooſes to reſort to the other ſecurity, he ſhall be entitled to recover the whole. The inconvenience would be very great. Suppoſe, the mortgagee lives at a diſtance: it cannot be imputed to the mortgagor as racheſs, that he does not ſee the indorſement made upon the deed. There would be no way of ſecuring himſelf from paying over again but by paying the whole at once. No man is obliged to give a receipt; and in tithe caſes particularly receipts are not given from an apprehenſion of creating evidence. This caſe is not like that of a purchaſer for valuable conſideration without notice, taking the legal eſtate; for the nature of the thing ſhews, it is a ſecurity for money.

Mr. Manſfield and Mr. Buſke for the defendants Wallywn and Co.—There is no doubt, if a bond or covenant is aſſigned, it is aſſigned ſubject to all the Equity between the original obligor or covenantor and the obligee or covenantee. There is a great difference between an inſtrument in its nature aſſignable, and conveying the eſtate at law, and an inſtrument not in its nature aſſignable. A mortgage conveys a legal right. The aſſignee has nothing to do with the Equities between the mortgagor and mortgagee. The deed being left in the hands of the aſſignee without indorſement is evidence to all the world, that the mortgage-money is ſtill due. Many caſes are to be found, that leaving deeds in the poſſeſſion of a perſon, ſhewing a title in that perſon to the eſtate, is conſidered as a caſe of fraud. In *Tourle* v. *Rand*, 2 *Bro. C. C.* 650. Lord *Thurlow* certainly ſhook that doctrine; which however was laid down as clear in Equity by Lord Chief Juſtice *Willes*: but it has never been imputed as racheſs, that a perſon taking fairly the legal eſtate for valuable conſideration has not

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not gone to inquire into the account as to the principal money between the mortgagor and mortgagee: as to the account of intereſt no one will ever advance more than the principal without communication with the mortgagor. The aſſignee will take care, that no intereſt ſhall be paid to the mortgagee after the aſſignment. Why did the mortgagor ſuffer his deeds to remain with the defendants? It was his lacheſs. He might have found out from *Shepheard*, where his deeds were. Having paid all the money due he ought to have had them delivered to him. A mortgagor may always be ſecure by indorſing upon the deed, if he pays part, and by taking up the deed, if he pays the whole. As to the caſes cited from *Equity Caſes Abridged*, certainly the Court will not permit the mortgagee to injure the mortgagor by taking the legal poſſeſſion and transferring it to an inſolvent perſon. It is truly ſaid, that then the mortgagee is a truſtee of the profits; the other caſe, that the mortgagor ſhall not be concluded by an account between the mortgagee and aſſignee, I conclude, related to ſome computation of intereſt; and it rather ſuppoſes the mortgagee to be in poſſeſſion. It would have been very ſimple and eaſy to have ſaid as to the queſtion, how the account was to be taken, that the aſſignee ſhould be accountable juſt as the mortgagee was. Where it is a ſimple tranſaction between a mortgagee and a perſon, to whom he owes money, it is never neceſſary for the mortgagor to join. The defendants had no notice, that *Shepheard* was the plaintiff's attorney.

Attorney General for the defendants the aſſignees of Shepheard cited *Dawſon* v. *Dawſon*, 1 *Atk.* 1. *Taylor* v. *Haylin*, 2 *Bro. C. C.* 310. and *Johnſon* v. *Curtis*, 3 *Bro. C. C.* 266. as authorities, that a ſettled account even with the expreſſion "errors excepted", cannot be opened, unleſs ſpecific errors are pointed out.

Solicitor General in reply.—If this point had not been always conſidered clear in favor of the mortgagor, it muſt have come on upon the queſtion of notice. The decree at the Rolls, the plaintiff being no party to the ſuit, cannot affect him. The caſe of a mortgagee in poſſeſſion, which has been frequently decided, and is the caſe moſt likely to happen, decides this queſtion. The only difference is, that where the mortgagee has been in poſſeſſion, there muſt be an account of the rents and profits: but if he has not been in poſſeſſion, then it is equally clear, there is an account of debtor and creditor to be taken. The aſſignee has always notice, that he takes an aſſignment of a matter of account; and therefore it is due from him to ſee to the account. It is not the practice to take an aſſignment without the mortgagor's being a party; unleſs he cannot be got at; and then it is incumbent upon the aſſignee to take all means of inquiry; and there is always a covenant upon the part of the mortgagee, that the ſum ſtated in the aſſignment is due upon the mortgage. The mortgagor has no right to inſiſt upon an indorſement on the deed: on the contrary the mortgagee may take even the whole money, and refuſe to execute an aſſignment, till his Counſel approve it. An action may be brought upon the bond, even after the mortgage is aſſigned. Can the aſſignee of the mortgage have the benefit of that, which is part of the ſecurity, though the aſſignee of the bond, part of the ſame ſecurity, could not? Particular notice is not neceſſary; becauſe a mortgage is always conſidered as a caſe of notice, that there is an account, debtor and creditor, to be taken: elſe the queſtion muſt often have been before the Court as a queſtion of notice.

The Lord *Chancellor* during the argument made the following obſervations:

As to the queſtion upon the account, admitting, that a ſettled account is not to be opened, unleſs ſpecific errors are pointed out, will this Court permit an account to ſtand, where upon the face of the account the attorney admits, that he has not given credit, and produced that ſtate of his affairs, that the client was entitled to have? It is the buſineſs of the attorney to keep his client's accounts.

Upon the other point, the mortgagee may convey the eſtate, the land veſted in him, without the privity of the mortgagor: he cannot charge more money: he cannot increaſe the principal: he cannot make the intereſt principal. If either the bond or the covenant was put in ſuit, no doubt, all money paid by the mortgagor would be ſet of. It ſtruck me at firſt, that it was quite different from the caſe of the bond; for that is not aſſignable at law. A mortgage is a conveyance of a legal eſtate; though this Court only holds it a ſecurity: for what? For the money, that upon the face of the mortgage appears to be due.

It is ſtrong in my mind, that the queſtion has been determined in bankruptcy upon a mortgage for a given ſum of money, but for a floating debt; where there has been a transfer of the mortgage with other ſecurities. *Weſt India* mortgages are almoſt always for a floating debt: a ſecurity given for a certain ſum; which is to cover what may be the balance.

In order to prevent the mortgagor from paying the intereſt to the mortgagee, I conceive, in the common courſe of buſineſs no man will take an aſſignment of a mortgage without notice immediately after taking it to the mortgagor. Then where he gives no notice to the mortgagor, but truſts to the mortgagee for payment of his intereſt, does he not take it upon the credit of the mortgagee?

The mortgagor cannot call for the mortgage deed without paying the whole money. Suppoſe you had kept *Matthews* before the Court, and taken the common decree for a foreclosure; in taking the account all payments made to *Shepheard* before the filing of the bill muſt have been allowed to *Matthews*, at leaſt in diſcharge of intereſt; becauſe here was no notice of the aſſignment but by the bill. It is a little difficult to diſtinguiſh the intereſt from the principal. I am not ſure what is the advantage of making mortgages transferable without the knowledge of the mortgagor.

This queſtion is new *in ſpecie*. I will conſider it, in order to think a little more upon the different bearings of it. It does ſeem to me not conſonant to the general courſe of Equity to conſider the eſtate as more than a ſecurity for a debt; and I do not find the means of diſtinguiſhing between the intereſt and the principal.

Aug. 6th. *Lord* Chancellor.—In this cauſe the queſtion was only, whether the aſſignee of a mortgage had a right to be paid according to the ſum, that appeared due upon the mortgage deed, whatever might be the ſtate of the account between the mortgagor and mortgagee. The circumſtances had nothing in them ſo particular as to vary at all the general queſtion. *Matthews* had created a mortgage,

gage, upon which *Shepheard* had advanced money; and *Shepheard* being his attorney, the purpoſe of creating the mortgage was, that money might be raiſed for the uſe of *Matthews*. *Shepheard* ought not to have made any uſe of the mortgage, but for the purpoſe, for which it was created: *viz.* to raiſe money for *Matthews*: but he thought fit to aſſign the mortgage without the privity of the mortgagor; and the aſſignee now claims to hold the mortgage to the full extent of the ſum appearing due upon the face of the deed.

When the cauſe came on before me, a caſe was referred to, in which, it was ſuppoſed, Lord *Thurlow* had entertained an idea, but not decided, that a mortgagor having permitted the mortgage deed without any indorſement upon it to be in the poſſeſſion of the mortgagee, an aſſignee taking from that mortgagee might have a right to hold that mortgage to the full extent of it againſt the mortgagor, who permitted the mortgagee to deal with and to make a ſecurity upon it. It was alſo ſuppoſed, that in practice there is no occaſion to make the mortgagor a party; and in ſome caſes it may not be poſſible to make him a party to the aſſignment; and that to hold, that the aſſignee of a mortgage is bound to ſettle the accounts of the perſon, from whom he takes the aſſignment, would tend to embarraſs transfers of mortgages. I have got all the information I could; and I think, I have got the beſt. The reſult is, that perſons moſt converſant in conveyancing hold it extremely unfit, and very raſh, and a very indifferent ſecurity, to take an aſſignment of a mortgage without the privity of the mortgagor, as to the ſum really due; that in fact it does happen, that aſſignments of mortgages are taken without calling upon the mortgagor; but that the moſt uſual caſe, where that occurs is, where it is the beſt ſecurity, that can be got for a debt not otherwiſe well ſecured; and it is not in the courſe of transferring mortgages, but of raiſing money upon ſuch ſecurities: but no conveyancer of eſtabliſhed practice would recommend it as a good title to take an aſſignment of a mortgage without making the mortgagor a party, and being ſatisfied, that the money was really due.

With regard to the caſe, that was quoted, I believe, that from the circumſtances of the firſt order, that was made, there might have been ſome doubt expreſſed at the time upon the point. The bill was filed by *Lunn* and others, aſſignees of *Lodge*, a bankrupt,

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againſt *St. John*. According to the ſtate of the caſe, I have had, *Lodge* made a mortgage to *Pitman*; who being indebted to *St. John* made an aſſignment to him for a ſum leſs in fact than the ſum due upon the mortgage. It was ſtamped and ſigned; but not ſealed. *Lodge* and *Pitman* both became bankrupts. The bill was filed; inſiſting, that nothing was due upon the account between their eſtates. The defendant *St. John* inſiſted, that the plaintiffs muſt redeem him; who was a fair mortgagee; and had nothing to do with the account. Lord *Thurlow* in the decree gave ſpecial directions to the Maſter to inquire, what was due at the time of the mortgage, what was due at the time of the aſſignment, and what remained due; ſaving the point, how far *St. John* would be affected, till after the report upon that ſpecial direction. It came on upon the report before the *Lords Commiſſioners*: the Maſter having reported, that *Pitman* was indebted to *Lodge* in 7000 *l*. By the order made upon that report it was declared, that the aſſignments, dated the 13th of *February* 1775 and —— *May* 1776, made by *Pitman* to the defendants *St. John* and *Muilman* are to be deemed null and void againſt the eſtate of *Lodge*, the bankrupt, and are to be delivered up by the defendants *St. John* and *Muilman* to the plaintiff, the ſurviving aſſignee of *Lodge*, to be cancelled; that all deeds and writings relating to the eſtate of *Lodge* be delivered up upon oath; and that the defendants join in reconveying the eſtate. The final reſult therefore was, that, nothing being due upon the original mortgage, the two aſſignees of it took no benefit by the aſſignments. Therefore that caſe is a direct authority in favor of *Matthews*.

As between mortgagee and perſons claiming under him, without the privity of the mortgagor they cannot add to what is due, ſettle the account, or turn intereſt into principal.

The caſes decided, and long decided, in *Precedents in Chancery* and *Vernon* ſeem alſo to bear very much upon it; where it was made a queſtion, now perfectly ſettled, that, as between the mortgagee and the perſons claiming under him, without the privity of the mortgagor they cannot add to what is due, ſettle the account, or turn intereſt into principal. The mortgagee having been in poſſeſſion, the aſſignee is bound to ſettle the account of the rents and profits received by the mortgagee, from whom he takes the aſſignment. Conſidering the general principles, upon which this Court acts with regard to mortgages, I have no difficulty in deciding the point. It is true there is a legal eſtate or term: but it muſt be apparent upon the face of the title, that it is not an abſolute conveyance of the term or legal eſtate, but as a ſecurity for a debt;

a debt; and the real tranſaction is an aſſignment of a debt from *A.* to *B.*: that debt collaterally ſecured by a charge upon a real eſtate. The debt therefore is the principal thing; and it is obvious, that if an action was brought upon the bond in the name of the mortgagee, as it muſt be, the mortgagor ſhall pay no more than what is really due upon the bond: if an action of covenant was brought by the covenantee, the account muſt be ſettled in that action. In this Court the condition of the aſſignee cannot be better than it would be at Law in any mode, he could take to recover what was due upon the aſſignment.

Therefore the plaintiff muſt be at liberty to redeem upon payment of what the Maſter ſhall find due upon the original mortgage from him to *Shepheard*. I will direct the account exactly in the ſame way, as Lord *Thurlow* made the direction in the caſe, I have cited: an account of what was due at the time of the mortgage, what was due at the time of the aſſignment and what remains due.

The account in that caſe was, I apprehend, changed by tranſactions ſubſequent to the mortgage: however I do not know that.

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Feb. 24th.
Aug. 2d, 6th.

Settlement upon marriage of ſtock, the property of the wife, in truſt from time to time to receive the dividends, and pay them into the hands of the wife for her ſole and ſeparate uſe; her receipt to be a diſcharge; after her deceaſe, if the huſband ſhould ſurvive, for him for life; and after the deceaſe of the ſurvivor, to transfer the principal among the children according to her appointment by will; in default thereof, equally; if no children, according to her appointment by will. The truſtees with the privity of the wife ſold the ſtock, and paid the money to the huſband taking his bond of indemnity: he died inſolvent. Upon the bill of the widow and children the fund having been replaced by the truſtees was transferred to the Accountant General upon the truſts of the ſettlement; the truſtees to pay the dividends to the widow from the death of the huſband; with coſts.

By a ſettlement, dated the 19th of *July* 1780, previous to the marriage of *John Whiſtler* and *Deborah Williams*, it was declared, that the ſum of 1200*l.* 3½ *per cent.* Bank Annuities, the property of *Deborah Williams*, which had been transferred to *James Maidment* and *Spencer Newman*, ſhould ſtand, remain, and be, in the names of them, the ſaid *James Maidment* and *Spencer Newman*; and that they and the ſurvivor of them and the executors and adminiſtrators of ſuch ſurvivor ſhould ſtand poſſeſſed of the ſame to, for, and upon, the ſeveral truſts, intents and purpoſes, and ſubject to the proviſoes, limitations and agreements, thereinafter mentioned and declared concerning the ſame: that is to ſay;

in truſt to and for the ſaid *Deborah*, her executors and adminiſtrators, until the marriage; and from and immediately after the ſolemnization thereof, then in truſt, that they, the ſaid *Maidment* and *Newman*, and the ſurvivor of them, ſhould from time to time receive and take the intereſt, dividends, and profits, thereof, and of every part thereof, as the ſame ſhould become due and payable, and pay the ſame and every part thereof into the hands of her, *Deborah Whiſtler*, for and during her natural life, for her own ſole, ſeparate, perſonal and peculiar, uſe; ſo that the ſame ſhould not be ſubject or liable to the debts, engagements, diſpoſition, intermeddling, or control, of the ſaid *John Whiſtler* during her then intended coverture by or with the ſaid *John Whiſtler*; but that the receipt alone of the ſaid *Deborah Whiſtler* ſhould notwithſtanding her coverture be a ſufficient diſcharge for the ſame; and from and after the deceaſe of the ſaid *Deborah*, in caſe ſhe ſhould happen to die in the lifetime of her intended huſband, then in truſt to permit and ſuffer the ſaid *John Whiſtler* to have, receive and take, the intereſt, dividends, and profits, thereof and of every part, as the ſame ſhould become due and payable, for his own proper uſe and benefit for his natural life; and after the ſeveral deceaſes of *John Whiſtler* and *Deborah Whiſtler* and of the ſurvivor then in truſt to pay, aſſign, transfer, and diſpoſe of the ſaid principal ſum of 1200*l.* Bank Annuities unto and among all and every the child and children of the marriage, or to ſuch one or more of them in ſuch parts and proportions, manner and form, and at ſuch times, reſpectively, as *Deborah Whiſtler* at any time or times hereafter notwithſtanding her coverture, or whether ſhe ſhould be then covert or ſole, by her laſt will and teſtament in writing, or any writing purporting to be or in the nature of her laſt will, by her, to be duly executed in the preſence of two or more credible witneſſes, ſhould direct, limit, or appoint; and in default of ſuch direction, limitation or appointment, then in truſt to pay, aſſign, transfer, and diſpoſe of, the ſaid principal ſum of 1200*l.* Bank Annuities unto and among all and every the children equally; and if but one, to that one, his or her executors, and adminiſtrators; to be paid to the ſons at the age of twenty-one, to the daughters at the age of twenty-one or marriage; and in caſe there ſhould be no children of the marriage, or all ſhould die in the life of the ſurvivor of their parents, before their ſhares ſhould become veſted and payable, without iſſue, in truſt to pay, aſſign, transfer, and diſpoſe of, the ſaid principal ſum of 1200*l.* Bank Annuities to ſuch perſon or perſons, and in ſuch manner and form and at ſuch time or times and for ſuch uſes, intents and purpoſes, as *Deborah Whiſtler* at any time or times, notwithſtanding her coverture, or whether ſhe ſhould be then covert or ſole, by her laſt will and teſtament in writing, or any writing, purporting to be or in the nature of her laſt will, to be duly executed in the preſence of two or more credible witneſs, ſhould bequeath, direct, limit, order and appoint; and in default of ſuch bequeſt, limitation, order, or appointment, and as to ſuch part, whereof ſhe ſhould make no ſuch bequeſt, limitation, order or appointment, in truſt to pay aſſign, transfer and diſpoſe of, the ſaid principal ſum of 1200*l.* Bank Annuities unto her executors or adminiſtrators; and to and for no other uſe, truſt intent or purpoſe, whatſoever.

The marriage took place; and in 1782 the truſtees ſold out the 1200*l.* Bank Annuities; and paid the money produced by the ſale to *John Whiſtler*. *Maidment*, the truſtee, was uncle to *Whiſtler*, and at the time this tranſaction took place was one of his creditors. In 1791 *John Whiſtler* died inſolvent; leaving his wife and ſix children by her ſurviving. About a year after the death of *Whiſtler* the truſtees replaced the ſtock by purchaſing 1200*l.* 3 *per cent.* Bank Annuities: the ſtock, in which the truſt fund was formerly inveſted, having been reduced.

The bill was filed by the widow and children againſt *Newman* and againſt the executors of *Maidment*, deceaſed; praying, that the defendants may pay to the plaintiff *Deborah Whiſtler* the amount of the dividends upon the 1200*l.* Bank Annuities from the time the truſtees had transferred the ſame; and that the 1200*l.* Bank Annuities purchaſed by the ſaid truſtees to replace the ſaid truſt Annuities may be transferred to the Accountant General upon the truſts of the ſettlement.

The defendants by their anſwer ſtated, that the truſtees had ſold out the ſtock, and paid the money to *John Whiſtler*, upon the importunity and requeſt of him and his wife, but more particularly of the ſaid *Deborah Whiſtler*, to the end and with the expectation, that the produce thereof being employed by *John Whiſtler* in his trade might be increaſed for the general benefit of *John* and *Deborah Whiſtler* and their children. The truſtees took a bond of indemnity from *John Whiſtler*; to which his wife was a ſubſcribing witneſs; and upon replacing the ſtock in 1791, the defendant *Newman* took a bond of indemnity from *Maidment*. Since the repurchaſe the dividends had not been paid to any one.

The defendants admitted, that they had refuſed to pay to the plaintiff *Deborah Whiſtler* the dividends accrued between the time of ſelling out the ſtock and the repurchaſe; and they ſubmitted, that ſhe is not entitled to call for them; the ſtock having been ſold out at her inſtance and requeſt, and with her privity, conſent and direction; which ſhe was competent to give; the ſaid dividends being ſettled to her ſeparate uſe; and as to the dividends accrued ſince the repurchaſe, they were claimed by the defendants, the executors of *Maidment*, during the life of *Deborah Whiſtler*, to reimburſe his eſtate for what he had paid and was liable to pay on account of the repurchaſe.

The only evidence in the cauſe was the depoſition of the attorney, who prepared the bond of indemnity from *John Whiſtler* to the truſtees. The deponent and *Deborah Whiſtler* were the two ſubſcribing witneſſes to the bond. His evidence went to her importunity and requeſt to the truſtees.

Mr. Manſfield and Mr. Johnſon for the plaintiffs.—If the whole of this defence was proved, it is no anſwer to the bill. This caſe is totally unlike the caſes upon an aſſignment made by the wife for valuable conſideration. They have gone the length of eſtabliſhing, that a *feme covert* ſhall be conſidered as a *feme ſole* as to her ſeparate property. Even thoſe caſes are received by the Court with great jealouſy; and the Maſter of the Rolls in ſome degree put a ſtop to them in a late caſe of *Sockett* v. *Wray*, 4 *Bro. C. C.* 483; where though the wife conſented in Court, as her power was only to diſpoſe by will, the Maſter of the Rolls would not let the money go. There is no caſe proving, that the wife can bind the property, unleſs it clearly appears to be the intention of all the parties, that ſhe ſhall have power to bind it.

In this caſe ſhe has no power to aſſign the fund. There is nothing to ſhew, ſhe intended to deveſt herſelf of her intereſt in it; or that ſhe conſented to its being diſpoſed of in the way, in which the Court would expect a married woman to conſent. She did not underſtand, that the fund would be loſt, and ſhe might be deprived of the intereſt. The truſtees took a bond of indemnity from the huſband. They ought to have told her, it would be a breach of truſt. There is no caſe governing this; and the Court will not make ſuch a precedent.

Attorney General and Mr. Hart for the defendants.—It was perfectly competent to Mrs. *Whiſtler* to make a ſecurity for her huſband's debts, or to make a preſent of the fund to her huſband. *Pybus* v. *Smith*, 3 *Bro. C. C.* 340. (*ante*, vol. 1. 189.) was heard by Lord *Thurlow* with great inclination to get rid of the law of the Court upon this ſubject. His *Lordſhip* ſtrained very hard for that purpoſe: but it was inſiſted, that all the caſes proved, that when once it is ſeen, that property is given to a married woman for her ſeparate uſe, in that caſe ſhe may make any diſpoſition of it ſhe thinks proper. It was doubted in that caſe, as it is now put, whether ſhe had any idea of the effect of her act; and therefore an inquiry was directed, which perhaps ought to be made in this inſtance, as to the circumſtances, under which ſhe conſented. After that inquiry Lord *Thurlow* with great reluctance found himſelf compelled to eſtabliſh it. *Ellis* v. *Atkinſon*, *Clarke* v. *Piſtor*, and *Newman* v. *Cartony*, 3 *Bro. C. C.* 347. in the note, were conſidered upon that occaſion. In the two laſt-mentioned caſes the bringing the bill was held to be equivalent to an appointment. In *Hulme* v. *Tenant*, 1 *Bro. C. C.* 16., the truſt was to receive and pay the rents and profits of a real eſtate to the wife for her ſeparate uſe for life, and to convey the eſtate itſelf according to her appointment by deed or will: ſhe executed an inſtrument in the form of a bond: though the bond was void at law, it was held an agreement in Equity, that this Court would execute. There are other caſes, in which a deviſe to the ſeparate uſe of a married woman without more has been held to give her a power of appointing by deed. This cannot be conſidered a breach of truſt without overturning all the caſes ſince the year 1740. They have gone to this extent; that the Court will compel the truſtees to give up the property to the huſband; as in Mrs. *Buller*'s caſe, in the ſame note. *Allen* v. *Papworth*, 1 *Veſ.* 163. is preciſely this caſe. The huſband in this caſe was in credit at the time. The object of the truſtees was to benefit him and his family by increaſing his capital in trade. The bond was taken to indemnify the truſtees with regard to the intereſt of the children; not to that of the wife. The conſideration is her intention to give the property to her huſband to employ it in trade for the benefit of herſelf and her family. In *Benyon* v. *Gollings*, 2 *Bro. C. C.* 323. (not reported as to this point) 800*l.* part of the portion of the wife was before the marriage ſettled to the ſeparate uſe of the wife for life; after her deceaſe to the uſe of the huſband for life; and after the deceaſe of the ſurvivor to the children; with reverſion to the wife, if there ſhould be no children. The truſtees ſuffered the huſband to get poſſeſſion of the whole property. The bill was filed to compel the truſtees to make it good. The deciſion was, that though the truſtees muſt make it good for the benefit of the iſſue, the wife ſhould not take any benefit; but the intereſt for her life was the property of the truſtees. An inquiry had been directed; and it came on upon farther directions. Taking it to be a breach of truſt, the wife as a *feme ſole* cannot complain.

Mr. Manſfield in reply.—In all the caſes the wife has had a power to aſſign, and there has been a clear, regular, formal, act by the wife, aſſigning the property for valuable conſideration. This is an expreſs truſt to pay the dividends into the hands of the wife. I think, ſhe might have directed the truſtees to pay the dividends to her huſband. The Court will never endure ſuch a tranſaction as this by truſtees, whoſe duty it is to protect the wife. Can ſhe, going to the truſtees either with her huſband or his attorney, be conſidered as acting freely? *Sockett* v. *Wray* is directly contrary to *Allen* v. *Papworth.* There is a great difference between the act done with theſe truſtees and the conſent of the wife in Court. There ſhe has all the guards, the Law requires.

Lord Chancellor.—Are not all theſe caſes only between the wife and a creditor of her huſband or herſelf? But is there any caſe, where a truſtee acting groſsly againſt his duty in permitting the wife to do this ſhall avail himſelf of that act done by her? If ſhe gives it for a debt of her huſband, ſhe has a right to be repaid out of her huſband's eſtate. She has truſtees to guard her againſt thoſe acts, ſhe might be induced to do by the influence of her huſband. Thoſe truſtees make themſelves parties to the act; and they reſt upon the credit of the huſband. They ſay to the *ceſtuy que truſt* "Do this; becauſe I will take a ſecurity from your huſband." Then they muſt make it good. What they have done, for which they are to anſwer, is an enormous breach of truſt by ſelling the whole ſtock. That they had no right to do. Then they have ſold it, taking a ſecurity from the huſband; being placed to guard the wife againſt his influence. They do it upon the ground of taking a ſecurity from the huſband. That is a good ground for ſaying, they ſhall make it good.

I do not think, any of the caſes come up to the preſent. They are all caſes of clear ſubſtantial creditors dealing with the wife upon a ſecurity, ſhe thought fit to give them. I feel a ſtrong inclination to take it thus againſt theſe truſtees: you have no right to alledge her conſent: ſhe is defrauded, abuſed, and cheated; and you know, ſhe was unfairly dealt with. Making her witneſs the bond, ſo ſtrange a way of getting her conſent, marks the iniquity of the tranſaction. I muſt ſuppoſe truſtees, acting according to their duty, to ſay to her, "you are not only by this act parting "with your own intereſt; but you are ſacrificing the intereſt of "your children."

The caſes have certainly gone this length, (and I am bound by thoſe deciſions,) that if a married woman has ſeparate property, ſhe may diſpoſe of it; and the truſtees are bound to follow her diſpoſition. One cannot but regret it: but I do not know how to help it. But the diſpoſal of her intereſt for life in this caſe is only acceſſary to her diſpoſition of the principal; which was a groſs breach of truſt. If the truſtees had ſet themſelves in the way, and ſaid, they would not ſuffer the ſtock to be ſold, I am by no means ſatisfied, the wife's intereſt would have been affected; for it would not have anſwered the purpoſe, for which they wanted to get the money; if it was to pay off the debts of the huſband or to increaſe his capital. If the truſtees had refuſed to ſell, the purpoſe failing, why am I to ſuppoſe, her intereſt was to be affected by itſelf?

Upon the evidence it does appear to me, that this caſe is very different from thoſe, that have been determined; for in no one of them have the truſtees been active. They have in every former inſtance been perfectly paſſive; ſubmitting to the wife. In this they are taking an active and moſt miſchievous part. They with the huſband and his attorney by not aſſerting their duty as truſtees to keep the fund, as it was, have trapped the wife to give up her intereſt; for it is very different, if her intereſt only paſſes, or the whole property is to be given up for the good of the family in augmenting the trade of the huſband. The whole act muſt be taken together. It is a large concluſion, that ſhe has given up her ſeparate intereſt, becauſe ſhe has allowed the whole fund to be diſpoſed of. If by the refuſal of the truſtees the purpoſe had failed entirely, the fund would have remained, as it was.

I do not recollect a caſe, where the truſtee has ſtood before me, aiding the huſband to ruin his family. But with this impreſſion upon my mind, I think, there ought to be an inquiry. They have a right to her examination. They might have filed a croſs-bill.

It was referred to the Maſter to inquire and ſtate to the Court, under what authority the 1200*l.* Bank Annuities were ſold out and transferred by the truſtees; and all parties were to produce upon oath all deeds, papers, and writings, in their power relating thereto, and were to be examined upon interrogatories.

The Maſter by his report, dated the 27th of *July*, ſtated, that the plaintiff *Deborah Whiſtler* had been examined upon interrogatories; and he found, that ſhe and her late huſband did before the execution of the bond aftermentioned frequently apply to the ſaid truſtees *Newman* and *Maidment* (which ſaid *Maidment* was the huſband's uncle), and requeſted them to ſell the ſaid 1200*l.* Annuities, and to let him the ſaid *John Whiſtler* have the money, for which the ſame ſhould be ſold, to employ in the trade; which the ſaid truſtees agreed to do upon being indemnified by him againſt any claims of the children; and the truſtees accordingly ſold out the ſaid Bank Annuities, and paid the produce thereof to the huſband; who executed and delivered to the truſtees a bond dated the 13th of *May* 1782, in the penalty of 3000*l.* to indemnify the truſtees againſt all damages by reaſon of ſuch transfer to the ſaid *John Whiſtler* and his wife: the execution of which bond was atteſted by the ſaid *Deborah Whiſtler*; who was informed of the contents thereof. *John Whiſtler* died inſolvent in *December* 1791, leaving the plaintiff *Deborah Whiſtler*, his widow, and the ſix infant plaintiffs, his only children. The dividends were paid by the truſtees to the plaintiff *Deborah Whiſtler* up to the time of the ſale. About twelve months after the deceaſe of *John Whiſtler* the plaintiff *Deborah* required the truſtees to replace the ſaid Bank Annuities and to pay the dividends to her; and the truſtees did

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accordingly upon the 26th of *January* 1793 purchaſe in their names and with their own money 1200*l.* 3 *per cent.* Bank Annuities; and the ſame now remain in their names: but the dividends have not been received ſince that period. The Maſter is of opinion, that the ſaid truſtees ſold out and transferred the ſaid 1200*l.* 3½ *per cent.* Bank Annuities upon the application and at the requeſt of the ſaid *John Whiſtler* deceaſed and his ſaid wife.

Upon this report the cauſe came on for farther directions.

Solicitor General and Mr. Johnſon for the plaintiffs.—The queſtion upon this report is, whether under the circumſtances of this ſettlement the application of the wife is a ſufficient indemnity to the truſtees againſt her demand? Clearly it is not, with regard to the capital, if there ſhould be no children; for by the expreſs terms of the ſettlement ſhe had no power to diſpoſe of the capital but by will. It was not to be executed by deed; therefore it was not the intention, that ſhe ſhould diſpoſe of it to her huſband to her own prejudice. It was argued upon the principle, that the wife having a proviſion for her ſeparate uſe muſt be taken as a *feme ſole* with reſpect to any diſpoſition, ſhe makes according to the power of diſpoſition given to her by the inſtrument. It muſt be ſo qualified. This diſpoſition is not in conformity to her power, but againſt the truſts of the ſettlement with regard to the capital. It makes the ſettlement perfectly nugatory. *Pybus* v. *Smith* was relied on, as having ſettled the law on the ſubject. I have no objection to conſider it ſo. That caſe is in ſtrict conformity to the preceding deciſions. The appointment was in perfect conformity to the power, with all the guards and ſolemnities required for her protection. The real queſtion was, whether ſhe could deveſt herſelf of the property without a judicial examination in the nature of a fine; and the authorities cited ſhew, that a judicial examination is not required in ſuch a caſe, however deſirable; and from the particular reference to *Cowey* v. *Richardſon*, ſtated by Lord *Hardwicke* from the Regiſter's Book in *Pawlet* v. *Delaval*, 2 *Veſ.* 669, it is perfectly clear, that, notwithſtanding the doubt in Lord *Thurlow*'s mind in *Pybus* v. *Smith* and *Ellis* v. *Atkinſon*, if a married woman diſpoſes of her ſeparate property according to her power, it is a good diſpoſition; though in favour of her huſband, or to ſecure his debt. It is too late now to ſay, it would not be a good appointment; for a great deal of property depends upon thoſe deciſions. But it is abſolutely neceſſary, that the act done ſhould have all the ſolemnities required by the ſettlement itſelf. Unleſs that is purſued, the act can have no effect. No irregular act can deprive a married woman of the property ſecured to her ſeparate uſe. It is true, in *Peacock* v. *Monk*, 1 *Veſ.* 193, it was held, that a bond by a married woman ſhould operate as a charge upon her ſeparate property: but it was treated as her debt, properly contracted by her, and therefore properly to be ſatisfied out of her ſeparate property. As to *Allen* v. *Papworth* (*a*), 1 *Veſ.* 163, it is true a married woman may bind herſelf by what ſhe does by her Counſel. In *Violet* v. *Bullfinch* the queſtion was, whether, a *feme covert* having permitted a decree by conſent could afterwards alter that: the Court was of opinion, that on account of the rights of other parties ſhe could not; though there ought to be caution in ſuch caſe: but no fraud or improper conduct appeared. In *Grigby* v. *Cox*, 1 *Veſ.* 517, the queſtion was, whether the deed, that was executed by the married woman, was an execution of her power of appointment. It was admitted, that it was according to her power; and it did not appear from any evidence in the cauſe, that the wife had been ſurpriſed and defrauded. The ſame ſort of queſtion was made as was attempted to be raiſed in *Pawlet* v. *Delaval* and *Pybus* v. *Smith*, that there muſt be a judicial examination of the wife: but that was determined not to be neceſſary. *Thayer* v. *Gould* at the Rolls, was cited. The deciſion againſt the truſtees was upon the ſame ground, that decided *Cunningham* v. *Moody*, 1 *Veſ.* 174. That caſe has been repeatedly

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(*a*) The *Solicitor General* upon citing *Allen* v. *Papworth* obſerved, that there is no ſtate of the caſe in the Report; and that it is to be lamented, that in the book, from which it was cited, the judgment of the Court is generally much more correctly given than the ſtatement of the facts.

From the circumſtances, under which that collection of caſes was ſubmitted to the Public, the Author could not avail himſelf of the free uſe of Papers and the eaſy acceſs to the Records of the Court, now ſo liberally afforded as to deprive negligence and error of all excuſe. The notes were taken at an early period of life, while the Author was a ſtudent, for a ſhort time that he continued at the *Engliſh* Bar, and, after having quitted it, at different times, when he was occaſionally in *London*, while the Court happened to be ſitting. For ſeveral years he had no intention of making them public; but was induced to commit them to the Preſs by the recommendation and deſire of Lord *Bowes*, then Lord Chancellor of *Ireland*; who, having heard thoſe notes frequently cited, deſired to ſee them, and in very flattering terms expreſſed his opinion; which his Lordſhip more ſtrongly marked by appointing the Author to the conſiderable ſituation in the Court, which he held for many years.

Should a future period of more leiſure, than the Author of this note can at preſent command, admit of his reviſing that work, he would feel a peculiar intereſt in contributing to maintain its claim to the favor of the Profeſſion, particularly by pointing his attention to the improvement ſuggeſted.

acted upon ſince: and is conſidered as having ſettled the law upon the ſubject. There is no doubt now, that if money is to be laid out in land, and ſettled upon a married woman for life there muſt be an examination; becauſe if the money is laid out, there muſt be a fine. There are general expreſſions in many caſes, that a *feme covert* is with regard to her ſeparate property to be conſidered as a *feme ſole*. In *Peacock* v. *Monk* this is ſtated as having fallen from the Lord Chancellor "And further if a wife having an "eſtate to her ſeparate uſe borrows money, which ſhe gives a bond "to pay under hand, this would give a foundation to demand "the money againſt her out of her ſeparate eſtate, ſhe being conſidered "as a feme ſole as to that, and the declarations of her, the "debtor, may be read in evidence." That is very clear. It is merely a *dictum*; but it demonſtrates what was Lord *Hardwicke*'s idea upon the ſubject; that the bond under her hand would give a foundation to demand it out of her ſeparate eſtate. It is in the nature of an appointment. She conſtitutes herſelf debtor for money actually paid to her.

In this caſe the attempt to charge the plaintiff is made upon her perſonal application to the truſtees and her being a witneſs to the bond of indemnity. It will probably be inſiſted, that her being a witneſs to the bond is upon the authority of *Peacock* v. *Monk* a ſufficient appointment in writing by her according to the terms of the power. That is not the nature of her intereſt in this property. In *Pybus* v. *Smith* and all the other caſes a power of appointment was given to the wife: the whole of the income was to go according to an inſtrument in writing; and having executed ſuch inſtrument in writing ſhe ought to be bound by it. In this caſe there is no ſuch power. The only diſcharge to the truſtees is payment into the hands of the plaintiff and her receipt acknowledging that. This caſe therefore differs importantly from *Pybus* v. *Smith*. No act done by the plaintiff was an appointment under her power; clearly not as to the principal; and if as to the intereſt, it muſt be held, that if all the children ſhould die during the life of their mother, though the intereſt paſſed, the capital did not; and it would belong to her repreſentatives after her death. In *Pybus* v. *Smith* and all the other caſes the truſtees were not culpable: in this they ſhew, they knew, they were acting wrong, by the bond of indemnity taken from the huſband, and by the ſpecial bond of indemnity, which after his death *Newman* required from *Maidment*. This caſe is diſtinguiſhed from all the others upon this: that the act is not pretended to be an execution of her power, but is admitted to be a breach of truſt.

Attorney General and Mr. Hart for the defendants.—If the tranſfer had not been made, but by the conſent of Mrs. *Whiſtler* the truſtees had paid the dividends into the general fund to ſupport the family, it would be the ordinary caſe; and the Court would conſider her ſatisfied by permitting her to have on account for one year. I admit, if there never had been a deciſion upon this ſubject, the laſt thing to be expected would be, that ſuch deciſions as have taken place would ever be made: but after ſo many deciſions contradicting the principle of the plaintiff, under which property of this kind has by very irregular acts been made matter of ſecurity and commerce in the world, it would be very dangerous to property now to go back to the proper principle. Poſſibly it may have occurred to the Court from time to time, that ſuch proviſions are rather miſchievous than uſeful. The deciſions ſhew the opinion of the Court. Lord *Thurlow* expreſſed a very ſtrong diſinclination to decide againſt the wife. In *Hulme* v. *Tenant* he ſtated the principle, that as to ſeparate eſtate a *feme covert* is to all intents and purpoſes a *feme ſole*. That muſt be the principle. His idea of *Pybus* v. *Smith* was, that it was an application deſiring him under circumſtances, which made him very unwilling to comply, to charge the property in a way, in which by the terms of the ſettlement it was not chargeable. Miſs *Vernon* was a ward of the Court. The ſettlement was made in conſequence of that. Lord *Thurlow* endeavoured to eſtabliſh the principle, that is now ſet up in ſupport of this demand; for he repeatedly ſaid, he thought, a *feme covert* having ſeparate eſtate ſhould be treated as a *feme ſole* to the extent, in which the terms of the inſtrument made her a *feme ſole*, and no farther: but that principle could not poſſibly be reconciled with the prior deciſions. He argued it thus; that by a ſettlement thus artificially and diſtinctly framed, as to that, which was to be income, and that, which was to be capital, it never could be the intention of the truſtees, or the Court, or any one dealing for the Lady, that with all this prudence, thus expreſſed, ſhe and her huuſband might the next day appropriate the whole of the dividends in a lump to the payment of a demand upon the huſband: but he could not decide, that that property, of which ſhe was meant to be a life-renter, was not abſolutely and out and out her own; and he very reluctantly acted upon it. *Ellis* v. *Atkinſon* had occurred a little before. Lord *Thurlow* deliberated much upon it; and the occaſions of the family made them compromiſe it.

Where the Court has decreed upon the huſband and wife merely filing a bill, the wife has not been protected; her will being conſidered ſufficiently declared by her conſent ſignified by filing the bill with her huſband. There was no appointment from time to time, no payment into her hands, no receipt given by her: yet the money was ordered to be paid out of court. It is impoſſible to deny, that in ſuch a ſettlement as that in *Hulme* v. *Tenant*, where the whole hiſtory of all theſe caſes is gone into, the intention muſt be, that the appointment ſhould apply only to the principal, not to the intereſt: but Lord *Thurlow* laid it down, that it was competent to a *feme covert* to act with regard to her ſeparate property as if ſhe was a *feme ſole*; that that was the proper rule; and he gave execution upon that bond. His Lordſhip carried it to the extent, that the gift being to her ſeparate uſe implied all the powers of diſpoſition; that ſhe is to receive the dividends as long as the capital remains undiſpoſed of by her: when ſhe has diſpoſed of that, ſhe can no longer receive in reſpect of it. Accordingly in *Fettiplace* v. *Gorges*, 3 *Bro. C. C.* 8. (*ante*, vol. I. 46.) he held, that a gift to the ſeparate uſe of a married woman is the ſame as a power to appoint by deed or will: if ſo, theſe words thrown in by the conveyancer can make no difference. Lord *Thurlow* thought, all thoſe phraſes "to pay into her own hands," &c, were included in the general gift to her ſeparate uſe. It is not, that nothing but her receipt ſhall be a ſufficient diſcharge, but that it ſhall be a diſcharge, though ſhe is a *feme covert*. It is impoſſible to adopt the former conſtruction; for then payment to the huſband with her conſent from time to time and expenditure in the family concerns with her conſent would leave the truſtees liable. The meaning is only to enable her to give a receipt. There is no preciſe form for her conſent. Her intention being expreſſed, it is no more than if ſhe had contracted a debt, and applied to the truſtees to pay to her huſband, in order that it might be diſcharged.

Solicitor General in reply.—The argument amounts to this; that the terms of the ſettlement ſignify nothing; and it is ſuppoſed, the opinion of Lord *Thurlow* in *Hulme* v. *Tenant* is in direct oppoſition to *Sockett* v. *Wray*; in which, though the wife appeared in Court to conſent, the Maſter of the Rolls would not direct the truſtees to transfer; ſaying, ſhe had a power to diſpoſe of the capital by will only. The effect would be to ſtrike out all the proviſions by way of guard to the wife. *Fettiplace* v. *Gorges* is a caſe of a very different deſcription. It was to the ſeparate uſe of Mrs. *Fettiplace*. There was no direction, that ſhe ſhould have a power of appointment by will in reſpect of what ſhould be due to her upon that account. She by will made a general diſpoſition of all her property to her niece; and the queſtion was between the niece and the huſband. It was held, that ſhe muſt have ſome mode of diſpoſing of it; and as the truſt did not expreſs any mode, it muſt be in the ordinary mode, in which perſonal property is diſpoſed of; that a power of diſpoſition is incident in its nature to a ſettlement for the ſeparate uſe of a married woman. Suppoſe, it had required a will with two witneſſes: if not ſo executed, it would not have been a good appointment againſt the huſband. If the power is complied with, the diſpoſition will be good, though in favor of the huſband, unleſs ſomething improper in the mode of obtaining it is proved.

The queſtion is, whether the truſtees have acted in conformity to the ſettlement? They have parted with the capital clearly in breach of the truſt as to the children. The ſettlement has not given her a power of executing any inſtrument, by which ſhe can authorize the truſtees to put it out of their power to have the dividends in their hands to anſwer the purpoſes of the truſt. If ſhe has done ſuch an act according to the ſettlement, ſhe cannot call upon the truſtees for the dividends: if not, the truſtees are reſponſible to her; for her acts, if not according to the ſettlement, are no acts. In *Hulme* v. *Tenant* the wife executed a bond, by which ſhe conſtituted herſelf debtor: though an informal inſtrument, it was in the nature of an inſtrument under her hand directing the truſtees to convey.

Mr. Piggott (*Amicus Curiæ*) mentioned *Hyde* v. *Price* (*ante*, vol. 3. 437,) where this point was conſidered by the Maſter of the Rolls.

Mr. *Lloyd* ſaid, that at the very time the ſettlement in *Pybus* v. *Smith* was ſubmitted to the Court they were preparing the deed, by which the effect of it was defeated.

Lord CHANCELLOR.—Sir *Thomas Sewell* never would let a transfer be made by the truſtees of a married woman without ſeeing her in court.

I wiſh to ſee, whether there are any caſes, that control the rule in theſe two before Lord *Thurlow*: particularly *Hulme* v. *Tenant*. Nothing could be more perfectly without all law than the bond in that caſe. It ſeems to require this principle in all its extent; that where the married woman has the property in the principal or dividends, whatever diſpoſition ſhe makes of it, if it is her pleaſure to do it even in ſo abſurd a way as by giving a bond, ſuppoſing ſhe knows ſhe is doing it, this Court will ſupport it, and build upon it. It takes away all protection from married women; and makes truſts for their benefit of very little importance.

Aug. 6th. *Lord* CHANCELLOR.—This queſtion occurs upon the Maſter's Report. The bill was filed by Mrs. *Whiſtler* and her infant children againſt the truſtees in the ſettlement made upon her marriage. The ſubject of that ſettlement was a ſum of 1200 *l.* 3½ *per cent.* Bank Annuities; which was veſted in *Newman* and *Maidment*, upon truſt to pay the dividends to the wife for life for her ſeparate uſe, and in caſe ſhe ſhould die in the life of her huſband, to him for life, and the principal to the children by the marriage; with a power to the wife to appoint by will in default of children, to ſuch uſes as ſhe ſhould think fit.

It happened, that the truſtees upon the ſolicitation of the huſband and with the privity of the wife thought fit to ſell out the ſtock, and to give the money produced by the ſale to the huſband: he being indebted to one of them: but I put that circumſtance out of the queſtion; chooſing to take it rather upon the general point than upon any ſpecial circumſtances appearing upon the Report. They took a bond of indemnity from the huſband; and the wife ſigned as a witneſs to the bond. The huſband became inſolvent, and died; and the object of the bill is to compel the truſtees to replace the ſtock. The truſtees bought in the ſtock again;

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again; which is transferred to the *Accountant General*; and they objected at the hearing, that the wife as to her intereſt for life ought to be bound by the act, that was done. What that was not appearing very diſtinctly, when the cauſe firſt came on, they had a right to the examination of the wife. She has been examined; and in the reſult of that examination ſhe does certainly admit an aſſent to the act done by the truſtees. All, that ſhe has done, is merely the circumſtance of ſigning as a witneſs to the bond. That ſhe was privy to the act, ſhe admits. She relates the hiſtory of it. She was prevailed upon in the common manner, in which things bad in themſelves are done, partly by being coaxed, partly by being bullied. The truſtees inſiſt upon the benefit of the dividends for the life of the wife. *Newman* got an indemnity from the other truſtee: but if I affect them both, their tranſactions between themſelves are immaterial.

The diſcuſſion at the hearing led to the examination of ſeveral caſes; particularly *Hulme* v. *Tenant*, *Pybus* v. *Smith*, and *Ellis* v. *Atkinſon*; in which a married woman, without any formal examination, any act done by her, or any thing to give validity and ſanction to the act, ſhe was about to do, having a right to the ſeparate uſe of an income of a real eſtate, or of a fund veſted in truſtees and therefore under the control of this Court, was conſidered as being *ſui juris*; and the Court dealt with her exactly as they would have done with the huſband. On the other hand a reference was made to *Sockett* v. *Wray*, and to *Hyde* v. *Price*, a very late caſe determined by the Maſter of the Rolls.

I do not hold it neceſſary to go into the inveſtigation of theſe different caſes: but I cannot help making one remark; that if the rule laid down in them is to be puſhed to its full extent, a married woman having truſtees and her property under the adminiſtration of this Court is infinitely worſe off and much more unprotected, than ſhe would be, if left to her legal rights; as far as they conſiſt of rights, which the huſband cannot *proprio Marte* affect. Such rights cannot be taken from her without a formal deed: not by implication and inference from converſation or conduct. Upon *Pybus* v. *Smith* it would be the vaineſt act to make a ſettlement upon a woman marrying under the direction of the Court. The ſettlement was made here after a reference to the Maſter, and was ſubmitted to the Court, and approved; and it was ſtated by

Mr. *Lloyd*, that within two days afterwards, and at the very time the ſettlement was ſubmitted to this Court, the tranſaction was going on, by which the effect of it was taken away from her; and ſhe gave up the benefit of all that care, the Court was taking for her protection.

But this caſe is under circumſtances very different from all thoſe caſes, that I have looked into; for in thoſe caſes the queſtion always came on upon the claim of a creditor of the huſband; ſtanding with regard to him upon a very fair, good, conſideration; and not bound by any tie or condition, or any duty towards the wife; bound by nothing but common humanity; and having a right to get what he could for a debt due from the huſband. But it is quite different here. I find myſelf in this ſituation. Here is a truſt fund ſtanding in the name of the Accountant General. The wife deſires the dividends to be paid to her. Her right is founded upon the plain face of the deed, the truſtees have ſigned, binding themſelves to pay the dividends to her. What is their anſwer? "We, your truſtees, have acted moſt unconſcientiouſly "with regard to you; aiding your huſband to get the fund into "his hands and ſquander it away; therefore you ought to pay us "for our breach of truſt." That ſtatement ſeems a little bold. Becauſe they have acted againſt their duty, that they owed to her, they will make her anſwer to them for that loſs, which they brought upon themſelves by truſting to the ſecurity of the huſband. I have no difficulty therefore to make them pay over the dividends to the wife and pay the coſts of the cauſe.

As to creditors of the huſband or perſons dealing with a married woman as to ſeparate property, Equity ought to go no farther than to leave any legal right undiſturbed; not to improve the ſecurity.

When it may be neceſſary with regard to creditors to enter into the conſideration of theſe caſes, it will be to be conſidered, whether the Court ought to do more than this: where the creditor of the huſband or perſon dealing with the married woman has got any legal hold of the fund, he muſt take it: if he has not any legal hold upon it, I am much at a loſs for any principle, upon which this Court can make his ſituation better, and improve a ſecurity, that the Law will not acknowledge. How far the law has gone in theſe caſes, it is not neceſſary for me to determine. Upon ſome of the caſes I have felt a degree of doubt, that I have not been able to remove: but it is going a great way farther, than any reaſon of juſtice, much more of Equity, will warrant,

rant, to extend that beyond any legal right, that may have been got, by the aid of a Court of Equity (a).

It cannot go back beyond the time of the huſband's death. They muſt pay her the dividends from the time of the huſband's death; and ſhe is to receive the dividends accrued, ſince the ſtock was replaced.

(a) For the principle as to the equitable intereſt of the wife, as between her and her huſband or parties claiming under him, See *Macaulay* v. *Philips*, *ante* 15. *Like* v. *Bereſford*, vol. 3. 506. and the caſes there cited.

Aug. 6th.

CARR *v.* EASTABROOKE.

Huſband and wife living ſeparate under a divorce *a menſâ & thoro* obtained againſt the wife for adultery, ſhe petitioned, that a ſum of money belonging to her might be ſettled to her ſeparate uſe; he petitioned, that it might be paid to him: the Court refuſed to make any order.

CROSS petitions were preſented by huſband and wife; the one praying, that a ſum of 350*l.* belonging to the wife might be ſettled to her ſeparate uſe; the other, that it might be paid to the huſband, without making any proviſion for the wife.

The circumſtances were theſe. Six weeks after the marriage the huſband ſailed to the *Eaſt Indies*: and upon his return he found, that his wife had eloped, and was living in adultery. He obtained a divorce *a menſâ & thoro* in the Eccleſiaſtical Court.

She continued to live in the ſame ſtate till the death of the perſon, with whom ſhe had eloped. Since that, it was alledged, that ſhe was ſupported by his mother; and that ſhe had no other proviſion.

Ball v. *Montgomery* (*ante*, vol. 2. 191) was cited.

Lord CHANCELLOR ſaid, he could make no order upon either petition: he could not ſettle this ſum to the ſeparate uſe of the wife; and muſt leave it as it was.

Ex parte SERGISON: In the Matter of CRIPPS, an Infant.

At the *Rolls*, *June* 12th. Before the Lord Chancellor, *Aug.* 6th.

The Lord Chancellor and Maſter of the Rolls inclined to think, the legal eſtate in mortgaged premiſes paſſed by a general reſiduary deviſe by the mortgagee to *A.*, who was alſo executor, his heirs, executors, adminiſtrators, and aſſigns, for ever on the ſide of his mother. *A.* being nineteen, the Lord Chancellor would not order him to join in the conveyance under the *Statute* 7 *Anne* *c.* 19. but ordered the money to be paid into the Bank *ex parte* the infant; and ſaid, when he ſhould come of age, it would be very reaſonable, that he ſhould join.

BY an order made on the 5th of *April* 1798 on petition it was referred to the Maſter to examine and certify, in whom the legal eſtate in certain premiſes was veſted; and whether *John Marten Cripps*, an infant, was a truſtee or mortgagee within the intent and meaning of the *Statute* 7 *Anne* *c.* 19.

By the report, dated the 23d of *May*, the Maſter ſtated, that *Warden Sergiſon* executed a mortgage in fee of the eſtates in queſtion by indentures of leaſe and releaſe, dated the 4th and 5th of *June* 1792, to *Richard Hamſhar*, to ſecure the ſum of 2000*l.* with intereſt; that by indentures of leaſe and releaſe, dated the 4th and 5th of *December* 1793, the mortgage was aſſigned to *John Marten*, and his heirs and aſſigns for ever. *John Marten* lately died; having duly made his will, dated the 20th of *September* 1797; by which, after deviſing certain real eſtates in manner therein mentioned to his great nephew the ſaid *John Marten Cripps*, he gave and deviſed all the reſt, reſidue, and remainder, of his eſtate both real and perſonal and of what nature or kind ſoever and whereſoever, not therein before ſpecifically given deviſed and bequeathed, to the ſaid *John Marten Cripps*, his heirs executors adminiſtrators and aſſigns for ever on the ſide of his mother; and he appointed the ſaid *John Marten Cripps* ſole executor.

The Maſter alſo found, that *John Marten Cripps* is an infant of the age of nineteen; and that at the date of the will he was eighteen.

The Maſter ſtated, that he was of opinion, that the eſtate aforeſaid did not paſs by the general deviſe contained in the will, but deſcended to the teſtator's nephew *John Wood*; who was his heir at law. He was alſo of opinion, that the ſaid *John Marten Cripps* was not a mortgagee or truſtee of the ſaid eſtate within the intent and meaning of the *Act*.

The petition was preſented by the mortgagor to the Maſter of the Rolls, ſtating theſe proceedings, and that the Maſter ought to have

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have certified; that *John Marten Cripps* was an infant mortgagee and truſtee within the *act*; and praying, that if the Court ſhall be of opinion, that the ſaid eſtate did not paſs by the will of *John Marten*, then that the report may be confirmed; but if the Court ſhall be of a contrary opinion, that the ſaid *John Marten Cripps* may be declared to be an infant mortgagee and truſtee within the intent and meaning of the ſaid *Act*, and may be ordered to convey the ſaid eſtate to the petitioner, or as he ſhall appoint.

June 10th.

Maſter of the Rolls (*a*)—I have read and conſidered this petition; and I think the Maſter wrong in his judgment. I am of opinion, that *John Marten Cripps* is a truſtee of the mortgaged premiſes; but I cannot order him to convey the eſtate; becauſe he as the executor is entitled to the money ſecured on the mortgage; and I cannot permit an infant, though he is an executor, to receive the money. I do not know what you can do without filing a bill.

I have ſpoken to ſeveral of the Judges and alſo to a very great Civilian upon this ſubject; and I really think, the Legiſlature ſhould forbid the Eccleſiaſtical Court to grant probate to an infant. The Eccleſiaſtical Judge told me, the Spiritual Court always do grant it; becauſe they conceive, if it was refuſed, the Court of King's Bench would compel them by a *Mandamus* to grant it. I aſked, whether a *Mandamus* ever had been granted for ſuch a purpoſe; but I do not find, it ever has.

This matter was conſidered in *Compart* v. *Compart*, 3 *Bro. C. C.* 195.

But as I do not diſmiſs the petition, if you are not ſatisfied with my opinion and judgment, you may apply to the Lord Chancellor.

Upon this a petition was preſented to the Lord Chancellor; praying ſimply, that the Maſter's report may be confirmed.

It was ſtated at the Bar, that the heir at law was willing to convey.

(*a*) The judgment of the Maſter of the Rolls *ex relatione*.

The

Ex parte Sergison.

The *Lord Chancellor* ſeemed inclined to think, there was enough in this will to paſs the mortgaged eſtate.

As further on this sort of point the decision of the present Chancellor [illegible] the [illegible], the day of March 1800. See further the note about Attorney Genl. v. Bucke 22. March 1800 in Index to Title n°. 10. See note 5. Ves. Jun. 239. & 8. Ves. Jun. 577.

Mr. Romilly for the petition obſerved upon the ſituation of the mortgagor; and ſaid, the *Act* diſtinguiſhed between a truſtee and a mortgagee by the word "or;" and in this caſe though the words "on the ſide of his mother" in the reſiduary deviſe are void, *Co. Lit.* 13. *a.* yet they afford a ſtrong inference, that the deviſor could not intend to paſs the mortgaged eſtate.

Mr. Cox for the infant ſaid, that all the late caſes required expreſs words to make the mortgaged eſtate paſs by the will.

The *Solicitor General* (*Amicus Curiæ*) ſaid, Lord *Northington* and Lord *Thurlow* had overruled Lord *Hardwicke*'s opinion (*a*); and Lord *Thurlow* ſaid, he thought it better to go back to Lord *Macclesfield*'s opinion.

See 1. Bro. Chan. Cas. 198. Where? In Marlow v Smith 2. Wms. 198.

Lord CHANCELLOR.—The beſt order, I can make for you, is to confirm the report, and to order the money to be paid into the Bank in the name of the Accountant General, *ex parte* the infant in this matter. You will therefore take your conveyance from the heir at law; who, you ſay, has no objection; and when the infant comes of age, if you chooſe, he ſhould join, I ſhould think it very reaſonable. So you will have your title *quacunque viâ datâ*.

The order was ſo drawn up (*b*).

(*a*) 1 *Atk.* 605.

(*b*) See Mr. *Butler*'s note *Co. Lit.* 203. *b.* note 96. and *The Duke of Leeds* v. *Munday*, *ante*, vol. 3. 348.

The circumſtances of this caſe had conſiderable effect in producing the *Act of parliament* 38 *Geo.* 3. *c.* 87. § 6 & 7; reciting, that inconveniences ariſe from granting probate to infants under the age of twenty-one, and enacting, that where an infant is ſole executor, adminiſtration with the will annexed ſhall be granted to the guardian of ſuch infant, or to ſuch other perſon, as the Spiritual Court ſhall think fit, until ſuch infant ſhall have attained the full age of twenty-one years; at which period, and not before, probate of the will ſhall be granted to him: ſuch adminiſtrator to have the ſame powers as an adminiſtrator *durante minori ætate* of the next of kin.

Where an infant is ſole executor, adminiſtration ſhall be granted to the guardian, or ſuch perſon as the Spiritual Court think fit, till the infant is twenty-one; at which time and not before probate ſhall be granted to him.

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Feb. 24th.
Aug. 9th.

ROBERTS *v.* POCOCK.

Legacies, to be paid out of a ſpecific ſecurity, which failed, held general upon the circumſtances.

Nathaniel Barlow by his will dated the 5th of *February* 1785, after deſiring, that all his juſt debts and funeral expences ſhould be fully paid and ſatisfied, gave and bequeathed to his two nieces *Jane Bean* and *Sophia Bean* the ſum of 4000*l.*, when and as ſoon as they ſhall ſeverally attain their reſpective ages of twenty-one years, equally to be divided between them, ſhare and ſhare alike; and in caſe either of them ſhall happen to die under age, then he gave the whole of the ſaid 4000*l.* unto the ſurvivor, when and as ſoon as ſhe ſhall attain that age: but in caſe they ſhould both die under age, he directed the whole of the ſaid 4000*l* to ſink into the reſidue of his eſtate and effects; and he gave to *Sophia Millar* the ſum of 500*l.*, when and as ſoon as ſhe ſhall attain her age of twenty-one years; and he directed the ſame to ſink into the reſidue of his eſtate, in caſe ſhe ſhould die under that age; and he gave and bequeathed to *Thomas Berdmore* the ſum of 500*l.* for the trouble, he had already had in the management of his (the teſtator's) affairs, and which he would have in the execution of his will. The will then proceeded thus:

"And I direct, that all the aforeſaid legacies ſhall be paid by and out of the monies, which are now due and owing from *Alexander Davidſon* of *Madras* Eſq. upon bond: but my will is, that in caſe I ſhall receive the ſaid monies, or alter the ſaid ſecurity, ſuch receipt or alteration ſhall not be deemed or conſtrued a revocation of any or either of the ſaid legacies; but the ſame ſhall in ſuch caſe be paid by and out of ſome other part of my eſtate and effects; and that all ſuch legacies ſhall bear intereſt after the rate of 5 *per cent. per annum* from the time of my deceaſe; and that the intereſt of the ſeveral legacies intended for the ſaid *Jane Bean*, *Sophia Bean*, and *Sophia Millar*, ſhall be paid to them reſpectively, or be applied by my executors hereinafter named for or towards the maintenance and education of them, the ſaid legatees, according to their ſeveral proviſions ſo intended for them reſpectively, until the ſaid principal legacies ſhall be paid and payable; and as to for and concerning all the reſt, reſidue, and remainder, of my eſtate and effects, of what nature or kind ſoever, and whether in ſettlement, or not, I

“ give, deviſe, and bequeath the ſame unto my dear and loving “ wife *Mary Barlow* for her own uſe and benefit abſolutely.”

He appointed his wife and *Thomas Berdmore* executor and executrix.

The teſtator being about the time of making his will poſſeſſed of three bills upon the *Eaſt India* Company, amounting in the whole to the ſum of 8471*l.* 13*s.* 4*d.*, which conſtituted the greateſt part of his property in *England*, by indentures, dated the 4th of *February* 1785, (the day preceding the date of his will,) declared, that *Thomas Berdmore*, in whoſe hands the ſaid bills were, his executors and adminiſtrators, ſhould ſtand poſſeſſed thereof upon truſt to lay the ſame out in Government ſecurity, and transfer the ſame according to the joint appointment of the teſtator and his then wife by deed; and for want thereof, and until appointment, to pay the dividends to his ſaid wife during their joint lives for her abſolute, ſole, and peculiar, uſe; and after his deceaſe, in caſe ſhe ſhould ſurvive him, to pay ſuch dividends to her and her aſſigns for her life; and after her deceaſe, and for want of ſuch joint appointment, to pay and transfer the principal according to the appointment of the teſtator by deed or will.

The bond mentioned in the will was dated the 5th of *May* 1783; and was executed by *Davidſon* to ſecure the ſum of 5000*l.* and an arrear of intereſt due from him to the teſtator. The condition expreſſed was for the payment to Mrs. *Mary Barlow*, the wife of *Nathaniel Barlow*, or ſuch other perſon as ſhould be authorized to receive the ſame in *London*, the ſum of 42866 *Arcot Rupees* 12 *Annas* and 1 *Pice*, with intereſt at 5 *per cent.*

The teſtator ſailed to the *Eaſt Indies* immediately after the execution of his will; and he died in *Auguſt* 1786 upon his return to *Europe*. *Thomas Berdmore* died in *November* 1785. In 1792 *Davidſon* died at *Madras* inſolvent.

The teſtator’s widow married —— *Pocock*; and the bill was filed againſt her and her huſband by the legatees to have their legacies paid out of the general perſonal eſtate.

The anſwer ſtated, that it appears by the books of the teſtator, that ſhortly before his departure from *Madras* he wrote to *Davidſon*, incloſing an account of the principal and intereſt due upon the bond to the 2d of *June* then next; informing *Davidſon*, that he was adviſed to get away as ſoon as poſſible; that he had taken the liberty to incloſe his account current up to the 2d of *June* next, with intereſt charged at 8 *per cent.*; and which he flattered himſelf, he (*Davidſon*) would not think unreaſonable; as no part of it had been paid in *England*; and ſtating the balance due to him at 14243 *Pagodas*, or 5697*l.* 4*s.*; and ſaying, he would take it as a favor, if *Davidſon* could ſpare him 5000 *Pagodas*; which, he ſaid, would hardly clear him and pay his paſſage.

The defendants believe, no part of the principal and intereſt ſecured by the bond was paid to the teſtator, except that *Davidſon* did in conſequence of that application pay him 5000 *Pagodas* to enable him to diſcharge ſome of the debts, he owed in *India*, and defray the expence of his paſſage to *Europe*; and the defendants are induced ſo to believe, becauſe they have found among the papers of the teſtator an account current, in which credit is given for 5000 *Pagodas* received from *Davidſon*. The principal and intereſt upon the bond remaining due, after deducting the amount of the 5000 *Pagodas* amounted on the 9th of *March* 1786 to 8958 *Pagodas* 28 *Fanams* and 60 *Caſh*; being equal to 3583*l.* 9*s.* 6*d.*; as appears by an account current in the hands of *Davidſon* to that time, found among the teſtator's papers. They believe, that at the death of the teſtator *Davidſon* was inſolvent; and that the only hopes of his creditors were from his retaining his ſituation under the *Eaſt India* Company. The teſtator was apprized, that the bond was not paid; and he made no attempt to inforce payment; knowing, that *Davidſon*'s ability to pay depended entirely upon his retaining his rank in the Company's ſervice. The defendants had heard long before the death of the teſtator, that the circumſtances of *Davidſon* had been and were greatly embarraſſed: but the defendant *Mary Pocock* denies, that ſhe knew, believed, or ſuſpected, or had any reaſon to believe or ſuſpect, that the teſtator at the time of his death believed, that the conduct of *Davidſon* was ſuch as would ultimately tend to ruin and waſte his eſtate: on the contrary ſhe believes, the teſtator had then ſanguine expectations, that *Davidſon* would be confirmed in the

Office of Governor of the Preſidency; and would therefore ultimately be enabled to retrieve his affairs, and ſatisfy all his creditors. The defendants do not know or believe, that the teſtator ever attempted to commence any action, or endeavour to procure the money otherwiſe than by friendly applications and by repreſenting the neceſſity of his return to *Europe* on account of his health, and his occaſion for money to diſcharge ſome debts and defray his paſſage.

The evidence for the defendants proved, that in *Auguſt* 1786 the circumſtances of *Davidſon* were generally reputed and eſteemed to be in a very embarraſſed ſituation; and that he was totally inſolvent.

Solicitor General, Mr. Grant, and Mr. Whiſhaw for the plaintiffs.—The queſtion is, whether a direction to the executors to pay out of a particular fund a legacy antecedently given purely and abſolutely ſhall convert that into a ſpecific legacy. The application of the will to this fund is in the ſhape of direction; and there is no connection between the gift and that direction. The Court will, if poſſible, in every caſe lay hold of circumſtances to conſtrue the bequeſt pecuniary: *Rider* v. *Wager*, 2 *P. Will.* 328. *Attorney General* v. *Parkyn*, *Amb.* 566, and mentioned in Mr. *Cox*'s note. The Court has in all caſes purſued the maxim laid down by Lord *Camden*; who ſeems in that caſe to have entertained a doubt, whether, even if the legacy was of a debt due to the teſtator by another perſon, yet if the amount of the debt is mentioned in the bequeſt, that ſhould not turn it into a pecuniary legacy. In *Aſhburner* v. *M'Guire*, 2 *Bro. C. C.* 108, alſo mentioned in Mr. *Cox*'s note to *Rider* v. *Wager*, Lord *Thurlow* diſſented from that doctrine of Lord *Camden*. *Badrick* v. *Stevens*, 3 *Bro. C. C.* 431, will probably be cited for the defendants: but there it was evident, the teſtator meant to parcel out the bond among the legatees, and to give them nothing but that bond; with a bequeſt to the obligor himſelf of the remaining part of the money due upon it, after the legacies were deducted. In *Pawlet*'s *Caſe*, Sir *T. Raym.* 335, the leading caſe, mentioned by Lord *Camden*, the legacy was held abſolute with a demonſtration of a particular fund, which might anſwer that legacy. In *Coleman* v. *Coleman*, (*ante*, vol. 2. 639,) nothing could be more ſpecific than the legacy: but upon the whole view of the caſe your Lordſhip thought it impoſſible, that the teſtator could mean any thing more

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than to give that bill upon the ſuppoſition, that it was not called in at his death. Your Lordſhip there intimated, that *Attorney General* v. *Parkyn* was determined upon great conſideration, and that Lord *Camden* gave a very able judgment. Upon the authority of that caſe *Carteret* v. *Lord Carteret*, ſtated in *Aſhburner* v. *M'Guire*, was determined by Lord *Bathurſt*. *Saville* v. *Blacket*, 1 *P. Will.* 777. *Ford* v. *Fleming*, 2 *P. Will.* 370. There is a material and important diſtinction between a gift of a ſecurity ſimply and a gift of a ſum of money payable out of a ſecurity. In the latter caſe it is conſidered as given according to the language of the Civilians *in numeratis*; and the fund is pointed out only for the ſake of the arrangement, or to prevent abatement. That diſtinction, though it has been complained of by ſome Judges, and was, I believe, thought refined by Lord *Thurlow*, will upon accurate conſideration appear not to be arbitrary or refined, but founded on principle; particularly that of Lord *Camden*, that this Court preſumes againſt ſpecific legacies; and will conſtrue a legacy general, unleſs a ſtrong intention to the contrary appears; which reſts upon the great principle in the interpretation of wills, a deſire to effectuate the intention. Upon this queſtion there is on the one hand a mere preſumption of an intention to revoke the legacy: on the other there is a ſtrong expreſſion in favor of the legatee. The Court therefore adopts the expreſs purpoſe in preference to that, which is implied; and conceives, that in general the intention is more likely to be anſwered by conſtruing it to be a general legacy, unleſs there is a ſtrong implication, that it is intended to be ſpecific. The caſe of loſs to ſpecific legatees by the failure of the particular fund is much more likely to happen than a deficiency of property to anſwer the general legacies. It is very rare, that a general legatee claims to be conſidered as a ſpecific legatee: but caſes to the contrary are very numerous.

The general inclination of the Court receives ſtrong confirmation from the particular circumſtances of this will. The drawer of the will provides againſt the only caſes in the contemplation of the teſtator: *viz.* his receiving the money himſelf or altering the ſecurity. In the latter caſe, if he meant to make it ſpecific, and merely that the legatees ſhould take their chance of the bond, it was natural for him to have ſubſtituted the new ſecurity in the place of the other. He goes on to give intereſt at 5 *per cent.* from the time of his deceaſe, not making that depend upon the recovery of the bond, but purely and abſolutely. They could have demanded that intereſt; and it would have been no anſwer by the executors, that they had not received the amount of the bond. It would be abſurd, that intereſt ſhould be paid out of his general eſtate upon a legacy not payable out of the general eſtate. Both clauſes ought to have effect, if poſſible; which can only be by conſtruing the ſecond additional, accumulative, and auxiliary. It is not likely, he could mean the maintenance and education of theſe his near relations to depend upon a doubtful and precarious fund; as this certainly was; the 5000 *Pagodas* having been recovered by mere accident. The ſame obſervation applies to the legacy to *Berdmore*; which was intended as a reward for his care and trouble.

Attorney General Mr. Mansfield and Mr. Lloyd for the defendants.—The only addition neceſſary to be made to the queſtion, as it has been ſtated, is, that the general tenor of the will muſt in all caſes be looked to. This is the weakeſt caſe, that has occurred. The ſum ſecured by the bond does not much exceed the amount of the legacies. The rate of intereſt upon the legacies is the ſame with that produced by the bond. The teſtator has not left to inference the caſes, in which theſe legacies ſhould be paid out of the reſidue. The particular caſes ſpecified exclude any other. He was aware of the law as to the ademption of a legacy and of the diſtinction between ſpecific and pecuniary legacies. By altering the ſecurity he could not mean altering the perſon of the debtor; for he could not do that without receiving the money; which is the other caſe ſpecified. It muſt mean, if he ſhould take any other ſecurity from *Davidſon*. He looked to the caſe, that ſome of the legatees might die before him; and having diſtinctly ſaid, he meant to give his wife every thing but ſo much of this debt as could be realiſed, whether in his life, or not, he adds, that if any of the legatees die in his life, his wife ſhall have even a part of that, except in the caſe of ſurvivorſhip pointed out. The word "ſuch" ſhews, that if the legacies were not payable, the intereſt would not be payable. The intereſt and principal are meant to come from the ſame fund; and the bond would have produced the intereſt. Suppoſe, upon his arrival in *India* he had found *Davidſon* dead inſolvent, and had been aſked, whether he meant by his will, that 5000*l.* not being recoverable, that his wife ſhould have the reſidue *minus* 5000*l.* It is impoſſible to ſuppoſe that to be his intention. It is not to be ſuppoſed, he would have taken ſo much out of the bulk of his fortune given to his wife, but upon the ſuppoſition, that this fund would be productive. Suppoſe, all the reſt of his property would only make up theſe legacies: could it then be argued? It muſt be admitted, that theſe legatees muſt have abated among themſelves, in caſe *Davidſon's* aſſets had produced 4000*l*. As to the argument from the particular nature of theſe legacies, it never occurred to the teſtator, that the caſe would happen, that has happened. This is not the caſe of a pecuniary legacy, where the *modus* of payment only fails. There is as clear an intention to give his wife his other property as to give to theſe legatees this part, which in the event is loſt. It is an accident; and the legatees can claim only the 5000 *Pagodas* received by the teſtator.

Coleman v. *Coleman* had a circumſtance in it, which brings it very exactly to the *Attorney General* v. *Parkyn:* the bill of exchange was given in ſtrict ſettlement. Another circumſtance was, that it conſtituted the bulk of his property. Your Lordſhip ſtated the argument with regard to the *Attorney General* v. *Parkyn*, that aroſe fairly; that upon the whole context of the will the teſtator intended to give his property. *Badrick* v. *Stevens* was clearly ſpecific: the remainder of the debt being given to the debtor, if the debt was received by the teſtator, it could not be contended, that it continued as a legacy. All the caſes except *Saville* v. *Blacket* ariſe upon the act of the teſtator. In that caſe the fund failed, as in this inſtance. It is a very ſingular caſe; and upon the particular juſtice of it there could be no doubt; though the language of the court is repreſented as general. There is a great difference, where the legacy fails by the act of the teſtator, and where the fund itſelf is loſt. Many caſes of the former kind have occurred, in which it was impoſſible to ſuppoſe, the teſtator meant the legacy to fail; as in *Aſhburner* v. *M'Guire:* but in the other caſe, the teſtator having made the diſpoſition upon a calculation of his property, if the fund fails, it alters the whole plan of his will.

Solicitor General in reply.—The queſtion is, whether the teſtator meant to give to his wife every thing but 5000*l*., not that ſpecific ſum of 5000 *l*. The eſtate might have been greatly increaſed, or greatly diminiſhed. If he had acquired a large fortune, that would have gone to his wife; but not upon the ſtate of the property, he had in view at the time of making the will. The true queſtion is, whether this is a conditional legacy, as every ſpecific legacy is, or whether it is abſolute. By altering the ſecurity he muſt mean either to lend the money to ſomebody elſe, or to take another ſecurity from *Davidſon*. It is clearly not upon any calculation of his property. There are no negative words. It is like the common caſe of a general legacy directed to be paid out of real eſtate; from which it does not follow, that it is not to be paid out of the perſonal eſtate. It is a conſtant rule, that ſubſequent words ſhall be conſtrued ſtrictly, ſo far as they go to defeat what has been previouſly given abſolutely. Another rule is, that what is directory ſhall not control the ſubſtance of the gift; as in the common caſe of a legacy at the age of twenty one, and a legacy payable at twenty-one (*a*). The direction, in caſe he ſhould receive the money or alter the ſecurity, applies to his apprehenſion, that it might operate as a revocation of the legacy; but does not go upon any calculation of his property. The Court cannot conjecture againſt an abſolute gift. There muſt be certainty. *Voet* upon the *Pandects* 35. tit. 1. § 5. "*Si teſtator ſcripſerit*, aureos quadringentos Pamphilæ dari volo, ita ut infra ſcriptum eſt: ab Julio autore aureos tot; & in caſtris quos habeo tot; & in numerato quos habeo tot; *& poſt multos demum annos deceſſerit, cum jam omnes ſummæ in alios uſus tranſlatæ eſſent, reſponſum fuit, Pamphilæ quadringenta deberi; quia veroſimilius eſt, patremfamilias demonſtrare potius hæredibus voluiſſe, unde aureos quadringentos ſine incommodo rei familiaris contrahere poſſent, quam conditionem fidei commiſſo injeciſſe, quod ab initio pure datum eſſet.*"

The ſame conſtruction has prevailed in all caſes. If a pure and abſolute eſtate is created, and words follow importing limitation, ſuch words are always conſtrued ſtrictly; for a condition is to be impoſed upon an abſolute gift, not upon probability, but demonſtration (*b*). The defendant muſt take the reſidue with all the conſequences. There is no reaſon to ſuppoſe, the teſtator intended, that ſhe ſhould take the whole of his property, and his own family nothing, becauſe *Davidſon* has failed. By a voluntary ſettlement made only the day before the execution of the will he made a very conſiderable proviſion for her. By the will he has

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(*a*) This diſtinction, adopted from the poſitive rule of the Eccleſiaſtical Court as to perſonal legacies, has not been approved; and does not take place as to legacies charged on real eſtate; which ſink by the death of the legatee before the time of payment. See *ante*, vol. 3. 543. and *Pearce* v. *Loman*, vol. 3. 135.

(*b*) *Bradley* v. *Peixoto*, *ante*, vol. 3. 324.

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denoted no intention in her favor, except, that ſhe ſhall take the reſidue; that is, what remains after all the purpoſes of the will are anſwered. This being a clear ſpecific fund, he thought it convenient in the ſtate of his property, that it ſhould be applied to this purpoſe. In *Earl of Thomond* v. *Earl of Suffolk*, 1 *P. Will.* 461. there were new words of gift; which is not the caſe here. In *Kirkpatrick* v. *Kirkpatrick*, before Lord *Kenyon*, when Maſter of the Rolls, legacies were given to perſons in *India*, and legacies to perſons in *England*; to be reſpectively out of the effects in the reſpective countries: that was held to be only a direction as to the payment; not to make them ſpecific.

Lord CHANCELLOR.—I wiſh to conſider of this caſe.

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Lord CHANCELLOR (after ſtating the will).—The event, which produced this queſtion, is, that the effects of Mr. *Davidſon*, who reſided in *India*, have from circumſtances well known to us, though he was of conſiderable reputed property, turned out to pay little or nothing.

The queſtion ariſing upon an event, that was not at all in the contemplation of the teſtator, leads to that ſort of diſcuſſion, which is always extremely unſatisfactory in the reſult: *viz.* what the teſtator would have done in a caſe, that was not foreſeen by him. On the part of the reſiduary legatee it was argued very plauſibly, that upon the whole of the will it was to be collected, that the teſtator had made an eſtimate of his fortune; that upon that fortune, ſo eſtimated, calculating, that he had a ſum of 5000*l.* well ſecured, he meant upon that ſuppoſition in his own mind to give theſe particular legacies; and that excluſive of that all the reſt of his fortune, not defined in the will, but ſuppoſed to be defined and eſtimated in his own imagination, he intended to give to his wife. Therefore it is concluded in the argument on one ſide, that if it had been in his view, that a caſe might happen, in which that 5000*l.* would be loſt, and the property would be diminiſhed to ſo great an extent, the probability is, he would not have given theſe legacies, at leaſt he would not have broken in to ſuch an amount upon the proviſion, he meant to give to his wife. It is alſo contended, that he has ſpecified two ways, in which his ſpecific purpoſe might fail of effect: his calling in the money, or altering this ſecurity, and it was contended with a good deal of plauſibility, that having expreſſed what was to be done in thoſe two caſes, an implication ariſes, that it could not be his intention in the caſe, that has happened, that the legatees ſhould charge the reſidue. On the other ſide it was contended, and very plauſibly likewiſe, that the intention was definite with regard to the legatees; that the ſum of his bounty is definite and abſolute with regard to them; that they ſtood in a near degree of relation to him: two were his nieces: the third was probably connected with him: the fourth is a legatee expreſsly for paſt ſervices, and as an inducement to him to act *quà* executor in the execution of the will and in making good the reſidue to the wife; that with reſpect to her there is no definite intention: he gives to her what he did not know how otherwiſe to diſpoſe of; what the law would have diſpoſed of, if he had not; a looſe floating reſidue; that they are not entitled to argue, that ſufficient appears upon the will to induce the Court to think, he had made it upon a calculation.

The arguments upon the one ſide and the other lead to this concluſion; that I cannot pronounce with any degree of certainty, what the teſtator would have done in a caſe, that never occurred to him. Firſt, it is evident, there was no ſuppoſition, that could induce him to make a proviſion for the caſe, that has happened. I am therefore to take the will, as I find it. The Court always feels itſelf diſpoſed to entertain that ſort of reaſoning. One would wiſh to do what one muſt ſuppoſe would have been the intention of the teſtator in the event, that has happened: but it really amounts only to conjecture. If I was aſked my opinion, I muſt fairly ſay, the arguments upon the one ſide and the other balance themſelves very much. Theſe legacies I find given, certainly not as ſpecific legacies; and I cannot apply any rule, that has been laid down as to ſpecific legacies, to theſe. He has not given the bond in form or in ſubſtance. The legacies are charged upon the bond: but they do not amount to it. Suppoſing, as he did, that the bond was a good ſecurity, it was worth much more than the amount of the legacies with intereſt at 5 *per cent.* from the deceaſe of the teſtator. Being in *India*, it could not be immediately called in. The benefit of the bond therefore belongs as a ſubſtantive part of his eſtate to the reſiduary legatee, charged, I think, with theſe legacies. The Court would have laid hold of it; and would not have permitted it to be applied to the prejudice of the legatees, except for the payment of debts. In this reſpect it might be ſaid to be ſpecific; that they were not to abate: but you cannot argue that upon this will; for there are no other legacies. Theſe are the only legacies. It rather aſſumes the queſtion to be decided.

Is it then conditional legacy? The legacies to the two nieces and the other girl are contingent with regard to the principal: but there is no condition with regard to the intereſt of thoſe three, and it is remarkable, that they are to be paid with intereſt at 5 *per cent.* from his death expreſsly for education and maintenance. If I am to adopt conjecture, it is a great ſtrain to hold, that if he was exerciſing his judgment, he ſhould have ſo provided, that the maintenance ſhould be paid for three or four years, and then all at once ceaſe by the accident, to which ſuch legacies are liable, and that has happened in this inſtance.

There is no principle therefore, upon which I can ſay, theſe legacies are not to be paid out of the reſidue, except by indulging in a ſtrain of conjecture, which is too ſlight and too dangerous for the Court to act upon.

Aug. 9th.

HINCKLEY *v.* SIMMONS.

Mutual wills by two unmarried ſiſters under twenty-one: the marriage of one does not revoke the will of the other.

Bequeſt to *A.* and in caſe of her death to *B.* held an abſolute intereſt in *A.*

RICHARD HINCKLEY by his will dated the 6th of *May* 1767, gave to his wife all his real and perſonal eſtate for life; and after her deceaſe he gave all ſuch eſtates both real and perſonal (except the leaſehold lands after-mentioned) to his eldeſt ſon *Thomas Hinckley*, his executors, adminiſtrators and aſſigns, for ever, or for ſuch other eſtate, as he, the ſaid teſtator, had in the ſame reſpectively; ſubject and chargeable with the payment of ſeveral ſums of money for the fortunes of the younger ſons of the teſtator; and he charged all the ſaid eſtates, both real and perſonal, except the ſaid leaſehold, with the ſum of 1000*l.*, which he gave to his daughter *Elizabeth Hinckley*, and the farther ſum of 1000*l.*, which he gave to his daughter *Mary Hinckley*; and he directed the ſaid reſpective legacies to be paid within twelve months after the death of his ſaid wife, in caſe his ſaid daughters ſhould then be twenty-one; and if either of them ſhould die, before their reſpective legacies ſhould become payable, that the ſurviving daughter ſhould be entitled to 200*l.*, part of the fortune of the daughter dying; and if both ſhould die before, they ſhould be entitled to receive their reſpective legacies, he charged all his eſtates with the ſum of 1000*l.* only; which he gave to his younger ſons. He gave the ſaid excepted leaſehold premiſes to his daughter *Elizabeth Hinckley* for the remainder of the term; and declared, that all his children ſhould take their reſpective legacies in ſatisfaction of any ſettlement or proviſion made for them before his marriage. He appointed his wife and his ſon *Thomas* executors.

The teſtator died in 1772.

Elizabeth Hinckley, when of the age of twenty and upwards, but under twenty-one, made the following will:

" I *Elizabeth Hinckley* of *Litchfield*, ſpinſter, do make this my
" laſt will and teſtament; and I do give and bequeath unto my
" ſiſter *Mary Hinckley* all my fortune and every thing I have a
" power to leave; and in caſe of her death I do then give and
" bequeath all I have to my mother *Mary Hinckley*; and I
" do hereby appoint *Mary Jones* of *Litchfield* executrix to this
" my laſt will and teſtament; in witneſs whereof I have now
" ſet my hand and ſeal this 30th day of *December* 1777."

Mary Hinckley, the ſiſter of *Elizabeth Hinckley*, being then about the age of nineteen made a ſimilar will, bearing the ſame date, and appointing the ſame executrix.

Both theſe wills were depoſited with the executrix *Mary Jones*, and continued in her poſſeſſion till the marriage of *Mary Hinckley*. On the 25th of *March* 1788 *Mary Hinckley* the mother died inteſtate.

By indentures, dated the 25th of *December* 1789, reciting, that *Thomas Hinckley* did ſome time ago agree to augment the fortune of his ſiſter *Elizabeth* by adding 500*l.*; which, it is therein mentioned, far exceeded the value of the leaſehold premiſes bequeathed to her by her father's will, to the pecuniary legacy thereby given to her, upon condition, that ſhe ſhould aſſign and transfer to him, his executors and adminiſtrators, the

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the ſaid leaſehold lands; and reciting the death of the mother, from which time he had paid his ſaid ſiſter the intereſt of the ſaid ſums of 1000*l.* and 500*l.* and that he had ſecured the ſaid ſums to her; ſhe releaſed her legacy, and aſſigned the ſaid leaſehold premiſes to *Thomas Hinckley*, his executors and adminiſtrators; and he gave his bond bearing the ſame date for the ſum of 1500*l.*

Similar indentures of releaſe were executed by *Mary Hinckley*, and a ſimilar bond of the ſame date by *Thomas Hinckley* to her for 1500*l.*

In *January* 1794 *Mary Hinckley* married *William Simmons*. *Elizabeth Hinckley* afterwards died ſuddenly after a few hours illneſs, during the greater part of which time ſhe was delirious, at the houſe of her brother *Thomas*; leaving her two brothers and her ſiſter *Mary Simmons* her next of kin. After the death of *Elizabeth Hinckley* her will, above ſtated, was found in a drawer in her eſcritoir.

The bill was filed by the two brothers of *Elizabeth Hinckley* upon the ground, that *Mary Simmons* had only an intereſt for life under the will of her ſiſter; and by the death of her mother in her life the principal lapſed, and was undiſpoſed of.

The bill charged, that the will of *Elizabeth Hinckley* was intended to be cancelled or deſtroyed.

The defendants *Simmons* and his wife claimed all the property of *Elizabeth Hinckley* under her will abſolutely; and by their anſwer ſtated, that both the ſaid wills of *Elizabeth* and *Mary Hinckley* were about the time of the marriage of the latter taken out of the poſſeſſion of *Mary Jones* by *Elizabeth Hinckley*; and the will of *Mary Hinckley* was deſtroyed by *Elizabeth Hinckley*, as the defendants believe: but they do not know, that the will of *Elizabeth Hinckley* was intended to be cancelled or deſtroyed; becauſe the defendants ſay, *Elizabeth Hinckley* continued to entertain the ſame degree of affection for her ſiſter after as before her marriage; and ſuch will was kept in *Elizabeth Hinckley*'s own cuſtody; and after her death was found in the ſame drawer in her eſcritoir as the bond of her brother; to which drawer ſhe frequently had recourſe to make indorſements upon the bond of receipts of intereſt; and the day before her death ſhe ſpent ſome time among her papers and letters in the ſame eſcritoir; and the drawer contained the will and bond and no other papers. The defendants admitted, *Elizabeth Hinckley* behaved with great affection to her brothers; but believe, ſhe had a much greater attachment to her ſiſter.

The cauſe was heard on bill and anſwer.

Aug. 9th.

Lord CHANCELLOR.—This is a caſe of very little difficulty. It is a hard caſe; and, as the circumſtances have turned out, I am rather inclined to think, the exiſtence of this will is a misfortune not intended by the perſon, who made it. All the arrangement, that took place in the family upon this project, leads to the ſuppoſition, that the two wills of the two ſiſters in favour of each other were by the marriage of one put out of the queſtion. But I cannot act upon that; and upon the conſtruction of the will I am perfectly ſatiſfied upon the caſe of *Lowfield* v. *Stoneham*, 2 *Str*. 1261; which is preciſely this; taking the words to import a contingency; and not limiting the eſtate of the defendant *Mary Simmons* to an eſtate for life. I am of opinion, ſhe is entitled abſolutely.

Therefore the bill proceeding upon the ſuppoſition, that *Mary Simmons* is entitled only to an intereſt for life, and that the money after her death is diſtributable, muſt be diſmiſſed (*a*).

(*a*) See *Lord Douglas* v. *Chalmer*, *ante*, vol. 2. 501.

Ex parte HENDERSON.

Aug. 11th.

A partnerſhip of three becoming inſolvent, and one being an infant, a joint commiſſion of bankruptcy againſt the other two was ſuperſeded.

GIFFORD, *Rawlins*, and *Graham*, carried on buſineſs in partnerſhip; and became inſolvent. At the time of their failure *Graham* was an infant.

A joint commiſſion of bankruptcy was taken out againſt *Gifford* and *Rawlins*; under which *Henderſon* applied to prove a debt: but his proof was rejected on the ground, that *Rawlins* was not a general partner, but was concerned only in particular adventures, after the debt to *Henderſon* was contracted. The commiſſioners alſo rejected his proof againſt *Gifford* alone.

Henderſon then took out a ſeparate commiſſion againſt *Gifford*; and was choſen aſſignee; and he preſented this petition; praying, that the joint commiſſion ſhould be ſuperſeded.

Attorney General and Mr. Alexander for the petition.—One of three partners being an infant, there muſt be ſeparate commiſſions againſt the other two. It has been determined, that where there are three partners, and one does not commit an act of bankruptcy, there may be ſeparate commiſſions againſt the two: but there cannot be a joint commiſſion againſt them.

Solicitor General and Mr. Johnſon for the aſſignees under the joint commiſſion.—Though it is true, an action might be brought againſt the three partners, including the infant, who muſt plead his infancy, yet if the fact is, that the whole demand is againſt the three, and the contract of partnerſhip is avoided as to one by his infancy, it remains the contract of the two. The infant having a right to inſiſt, that he is not bound by any contract, he has made, the demand would be againſt the two in effect; and the infant pleading his infancy, the judgment would be againſt the two in the action. A commiſſion of bankruptcy is in the nature of an execution upon a judgment.

Attorney General in reply ſaid, that where one of three partners does not commit an act of bankruptcy, there muſt be a ſeparate commiſſion againſt each of the other two: yet it might as well be argued in that caſe, that it was the contract of the two.

Though one of three partners is an infant an action muſt be brought againſt all three.

Lord CHANCELLOR.—There is great difficulty in it; for not only the action, may, but it muſt, I imagine, be brought againſt the three. I wiſh very much I could ſupport this commiſſion. The petitioner has no right but upon the ſeparate effects of *Gifford*, or what he can make out to be the effects of *Gifford* and *Graham*, unconnected with *Rawlins*.

I am not inclined to make any order upon the petition. It is a legal objection, and I am afraid, a good one. I can do nothing by my order, that would protect you.

Upon the propoſal of the *Solicitor General*, an order was made, that the commiſſion ſhould be ſuperſeded without prejudice to taking out a ſeparate commiſſion againſt *Rawlins*.

Ex parte BADGER.

Aug. 11th.

A mortgage upon a bankrupt's eſtate being deficient, the mortgagee proving the remainder of his debt under the commiſſion cannot charge intereſt beyond the date of the commiſſion.

THE petitioners were creditors in reſpect of two mortgages from a bankrupt. The Commiſſioners under the General Order, made the 8th of *March* 1794 (*a*), took an account of what was due to the mortgagees; which amounted to the ſum of 3439*l.* 8*s.* 8*d.*; and the Commiſſioners ordered the mortgaged premiſes or a ſufficient part thereof to be ſold; and the petitioners purchaſed the mortgaged premiſes for 1980*l.*

The petitioners offered to prove the remainder of their debt: but the proof was rejected, and the aſſignees refuſed to make the conveyance, upon the ground, that the petitioners were not entitled to charge intereſt beyond the date of the commiſſion.

The petition prayed, that the aſſignees may be ordered to execute the Conveyance to the petitioners; and that they may be at liberty to prove the balance remaining due to them *viz.* 1536*l.* 14*s.* 4*d.*

Attorney General for the petition acknowledged the caſes, *Ex parte Wardell* and *Ex parte Hercy*, 1 *Cooke's Bankrupt Laws* 181; that where the mortgage is inſufficient, intereſt ſhall be only up to the date of the Commiſſion; but ſaid, the doubt aroſe upon the General Order of the 8th of *March* 1794.

Mr. Steele for the aſſignees ſaid, the General Order could not be intended to do away the deciſions, that had been made; and he preſſed for coſts.

Lord CHANCELLOR.—It muſt be according to the courſe of the Court in other caſes, where the mortgage is deficient.

The petition was diſmiſſed without coſts.

(*a*) That Order and the other General Orders made in bankruptcy by Lord *Loughborough* are printed at length at the end of Mr. *Cooke's* ſecond volume, Edit. 4.

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JONES *v.* Lord SEFTON.

Teſtator gave all the reſidue of his perſonal eſtate to his wife, except ſuch parts as ſhould be in and about his houſe; which parts he gave to his ſon; and directed the houſehold furniture to go as heir-looms; and gave all arrears of rent, which ſhould be due to him at his death, to his ſon: a bond to ſecure an old arrear of rent, and caſh, both found in an iron cheſt, in which the ſteward kept the caſh ariſing from the rents, belong to the reſiduary legatee.

The late Lord *Sefton* by his will gave to Lady *Sefton* all the reſidue of his perſonal eſtate and effects of what nature and kind ſoever except ſuch parts as ſhould be in and about his houſe at ——; which parts he gave to his ſon: and he directed the houſehold furniture to go as heir-looms. The teſtator alſo gave all arrears of rent, which ſhould be due to him from his *Lancaſhire* eſtate at his death, to his ſon.

The bill was filed by annuitants and legatees under the will; and by the Decree an inquiry was directed, what part of the perſonal eſtate and effects of the teſtator were in and about his houſe at his death, and the nature thereof.

By the Report it appeared, that in an iron cheſt, in which the ſteward kept the caſh ariſing from rents and profits, were found a bond to the late Lord *Sefton* dated the 13th of *November* 1784, to ſecure to him the ſum of 215*l.* 10*s.* arrears of rent, and in caſh the ſum of 373*l.* 2*s.* 9*d.*

The cauſe coming on for further directions, the queſtion was, whether the bond and caſh found in the iron cheſt paſſed to Lady *Sefton* under the reſiduary diſpoſition, or to Lord *Sefton* under the exception and the diſpoſition of the arrears of rent.

Attorney General for the defendant Lord Sefton.—With regard to the bond, it is given to Lord *Sefton* as arrear of rent: that arrear being ſecured by it. As to the money, that having ariſen from rents received is part of the perſonal eſtate not given to Lady *Sefton* under the general reſiduary clauſe.

Solicitor General and Mr. Short for Lady Sefton.—With regard to the bond, there can be no queſtion. It cannot be conſidered as paſſing under the exception of things in and about the houſe. There are ſeveral caſes ſhewing, that a bond cannot have that locality: *Moore* v. *Moore*, 1 *Bro. C. C.* 127. Neither can the bond paſs under the words "arrears of rent." The conſideration of the bond was undoubtedly, that the ſum, for which it was given, had been arrear of rent due: but it was converted into a debt.

No diſtreſs or other remedy could have been taken for that money as arrear of rent. It could not be in the intention of the teſtator as arrear of rent, that he meant to give to his ſon in the current account of the ſteward. That arrear was converted into a debt ever ſince 1784.

The caſh cannot go to Lord *Sefton*. It is no part of the perſonal eſtate in or about the manſion-houſe, except as the perſon of the ſteward happened to be there. He received the rents; and made payments; and he kept the caſh in that cheſt.

Lord Chancellor.—There is no annexation. The iron cheſt belongs to Lord *Sefton* as an heir-loom. The contents of it are perſonal eſtate.

Direct the bond and the caſh to be paid to Lady *Sefton*.

Michaelmas Term,

39 Geo. 3. 1798.

Nov. 12th.

Ex parte BOWES.

The owner of a ſhare in a ſhip is not in that character ſubject to the Bankrupt Laws. *Qu.* Whether lying two months in priſon charged in actions for debts and being ſurrendered in diſcharge of bail can conſtitute an act of bankruptcy; the original commitment being under a criminal ſentence; during which the party was ſo charged. Commiſſion of bankruptcy ſuperſeded on the grounds, that the act of bankruptcy was near 11 years before, and perfectly notorious; and that it was founded upon the debt of a creditor, who muſt of neceſſity gain the whole direction; and the debt being a matter of account, diſputed by the bankrupt in an action, in which he ſwore to a debt to him, and by filing a bill in Equity.

The petition was preſented by *Andrew Robinſon Bowes*, againſt whom a Commiſſion of bankruptcy iſſued on the 3d of *Auguſt* 1798, praying, that the Commiſſion may be ſuperſeded at the expence of *Francis Peacock*, the petitioning creditor; or that the proceedings may be ſuſpended until the trial of an action brought by the bankrupt in order to try the validity of the Commiſſion.

The petitioner was declared a bankrupt by the Commiſſioners at *Guildhall* upon the following evidence:

As to the act of bankruptcy.—The petitioner was on the 16th of *June* 1787 committed to the *King's Bench* priſon by order of the Court of *King's Bench*; and ſince that time he has been and now is charged with ſeveral actions. On the 26th of *November* 1787 he was ſurrendered in diſcharge of his bail at the ſuit of *Robert Crundall*; at whoſe ſuit he has ever ſince been detained.

As to the trading.—*T. Willoughby* depoſed, that it appeared by a certificate of regiſtry at *Newcaſtle-upon-Tyne*, dated the 7th of *November* 1786, and tranſmitted to the Cuſtom-houſe, *London*, that the petitioner was part-owner of a ſhip, called the *Aurora* of *Newcaſtle*; and no alteration in the property of the ſaid veſſel appears to have taken place as to the ſaid ſhare until the 16th of *April* 1794.

Samuel Marſhall depoſed, that by the direction of the petitioner the deponent ſold an eighth part of the *Aurora*, as the petitioner's ſhare of the ſaid ſhip, in *October* 1792, for 50*l.*

It was proved by a clerk of the Cockett-office, that the *Aurora* in 1787 brought coals from different collieries to *London*. It was alſo proved by a coal-factor of *London*, that at different times from *April* 1787 to *September* 1790 *Robert Millner* as ſhip's huſband of the *Aurora* conſigned various quantities of coals from different collieries to a coal-factor in *London*.

Robert Edington depoſed, that the petitioner was ſole owner of one colliery, and was concerned in four other collieries, called the Grand Alliance, but had no intereſt in the collieries, with the produce of which the *Aurora* had been freighted; that from the year 1787 to 1792 he was a part-owner of the *Aurora;* and that the ſaid bankrupt freighted the ſaid ſhip with coals of other perſons, and endeavoured to get his living thereby; that the ſaid ſhip *Aurora* hath been freighted home from the *Baltic* with goods of various deſcriptions on account of the ſaid bankrupt and the other proprietors of the ſhip.

The affidavit of *Mary Millner* widow and adminiſtratrix of *Robert Millner* ſtated, that the bankrupt was an original owner of one ſixteenth part of the ſhip *Aurora* from 1777 or 1778 till the latter end of 1792; that during that period ſhe traded, and was freighted on ſeveral voyages in the coal trade, to the *Baltic*, and elſewhere, on account of all the owners; ſtating particularly ſeveral voyages from the books of the ſhip; and that in 1779 ſhe went into the Tranſport ſervice, and was employed by Government for ſome years.

A letter from *Millner* to the petitioner, dated the 2d of *December* 1785, ſtated an account of the profits of the ſhip *Aurora;* and ſtruck the balance due to the petitioner for his ſhare; which was paid by a draft of that date.

As to the petitioning creditor's debt.—*Francis Peacock* depoſed, that the bankrupt was before the date and ſuing forth of the commiſſion and ſtill is indebted to the deponent in the ſum of 8200*l.* on the balance of accounts for money lent and advanced, laid out and expended, and for work and labour, care and diligence, in the concerns of the bankrupt.

The *affidavit* of a clerk to *Peacock* ſtated, that *Peacock* was retained as agent to the bankrupt in 1785; that the bankrupt drew upon *Peacock* for conſiderable ſums; which were paid out of *Peacock*'s private effects; and that the deponent frequently freighted ſhips with coals by the bankrupt's direction and on his account.

The petitioner alleging, that *Peacock* was indebted to him, brought an action, in which he ſwore to a debt due to him; and in *Hilary* term 1798 he filed a bill for an account; to which the defendant put in an anſwer in *April*.

Affidavits were offered in ſupport of the petition: but the Lord *Chancellor* deſired, that it ſhould be taken up upon the evidence before the Commiſſioners; and directed the Counſel to confine themſelves to that.

Attorney General, *Solicitor General*, *and Mr. Hart*, *for the petition*.—This Commiſſion cannot be ſupported, either as to the act of bankruptcy, the trading, or the petitioning creditor's debt.

As to the act of bankruptcy; the lying in priſon muſt be upon an arreſt for debt, both according to the letter and ſpirit of the act (*a*). But if an act of bankruptcy can be ſuſtained upon this impriſonment, it muſt be contended, that the act of bankruptcy was committed in 1787; and it will by the effect of the relation overreach all the tranſactions of the petitioner with his creditors and others ſince that period.

As to the trading; it is impoſſible, that as owner of a ſhare in a ſhip a man can be ſubject to the bankrupt laws: otherwiſe there could have been no oppoſition to the Commiſſion in *Thompſon*'s caſe (*b*). This evidence amounts to nothing more than that the ſhip was freighted on account of the owners; and that through the medium of the ſhip goods were ſometimes conſigned to the petitioner. They might have been conſigned to him as truſtee. The expreſſion is, that he freighted the ſaid ſhip with coals of other perſons; and *endeavoured* to get his living thereby. All mention

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(*a*) 21 *Jam.* 1. *c.* 19. § 2.

(*b*) The bankruptcy after being very obſtinately diſputed by the bankrupt was finally eſtabliſhed. See *Chambers* v. *Thompſon*, 4 *Bro. C. C.* 434.

of trading, *viz.* buying and ſelling with a view to profit, is carefully avoided.

The debt, upon which this commiſſion has iſſued, is founded upon a long account between principal and agent; the reſult of many tranſactions; which are now the ſubject of a bill in this court for an account filed by the petitioner; who in an action brought by him has ſworn to a large debt due to him from this petitioning creditor.

Lord CHANCELLOR.—As a ſhip-owner merely a man can never be ſubject to the Bankrupt Laws. Perſons of the higheſt rank in the country have ſhares in *Eaſt India* ſhips. If this is to prevail, half the Houſe of Lords, including the Biſhops, would be liable. A part-owner of a ſhip cannot keep the ſhip idle; and when the dividend is made of the freight, he muſt have his ſhare. *Thompſon's* caſe was employing the ſhip in carrying his own goods; which goods he bought and ſold; and the point, he made, was, that he employed the ſhip in bringing home his own property. Upon this evidence alſo, if there was a ſingle kit of ſturgeon directed to Mr. *Bowes*, that would be within the affidavit.

I wiſh to point out another conſideration, with regard to the act of bankruptcy. The *Statute* ſays, that if a perſon being arreſted for debt ſhall after this arreſt lie in priſon two months or more upon that or any other arreſt or detention in priſon for debt, he ſhall be adjudged a bankrupt from the time of the firſt arreſt. By the evidence the petitioner was not arreſted for debt; but was committed upon a criminal ſentence in execution; and during the courſe of that commitment he was charged with debts. The particular charge is, that in the month of *November* after his commitment he was ſurrendered in diſcharge of his bail in an action. The ground of an act of bankruptcy by lying two months in priſon evidently is, that if a man has not credit enough to procure bail, and deliver himſelf from that arreſt, that is a good ground to hold, that he is totally inſolvent, and therefore an object of the Bankrupt Laws. But upon a commitment under a criminal ſentence he cannot get out. It is perfectly new to found a commiſſion upon a lying in priſon upon a commitment for a crime, and for a period far beyond the two months.

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Mr. Mansfield and Mr. Cox in ſupport of the Commiſſion.—The reſult of the evidence is, that the petitioner and the other part-owners of this ſhip bought coals from the fitters, and ſent them to *London* and other ports; ſelling the coals again and making a profit thereof. His having any other character will not exempt him. His carrying on that trade to any extent will be ſufficient. Perſons have at law been found bankrupts without proving more than one inſtance of trading: one or two inſtances have often been thought ſufficient; if it is clear from that, the party was in a courſe of trade: *Patman* v. *Vaughan*, 1 *Term Rep. B. R.* 572. The words "*ſought and endeavoured*" occur in all the caſes at law. There is no appeal from the deciſion of the Commiſſioners againſt the Commiſſion: whereas the bankrupt has an opportunity of trying the queſtion. If there is any doubt as to the period of the act of bankruptcy, it is proper for the deciſion of a jury. The Commiſſioners could *not* take into conſideration the effect of the relation in overturning other tranſactions. As to the doubt now ſuggeſted by your Lordſhip, whenever a man is charged in execution, he is within the meaning of the Bankrupt Laws arreſted for debt; and from that moment his lying in priſon two months will make him a bankrupt. Any mode of impriſoning for debt, whether by a bailiff or by charging the defendant when in cuſtody is equally an arreſt for debt in judgment of law. Suppoſe a bail-bond was given, and the defendant was afterwards ſurrendered in diſcharge of his bail; though no actual arreſt took place, that is an arreſt in judgment of law. So, if he is charged in execution by another creditor, if his perſon is in any way ſecured in jail, he is in the ſenſe of the law arreſted. The petitioner has long ceaſed to be in priſon under his ſentence: but he is ſtill in priſon for theſe debts; and as he cannot get out without paying them, his confinement for another cauſe would make no difference. Suppoſe, he had lain five or ſix years in priſon for debts, that turned out to be imaginary, and at the end of that time a detainer was lodged againſt him for a real debt, upon which he lay two months in priſon: it is not clear, that the act of bankruptcy could have its origin from the original commitment.

Attorney General in reply.—The foundation of ſuch a Commiſſion, taken out in 1798 upon an act of bankruptcy committed in 1787, ought to be moſt narrowly inſpected. The petitioning creditor's debt, if it exiſts at all, muſt be taken upon the proceed-

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ings to have exiſted at that time. It is a debt due from a principal to an agent; the *items* of which the agent has not ſtated, and the principal does not know: but he appears to have been very anxious to know the circumſtances; and it is not through his fault that it is in the dark.

As to the trading, I do not deny, that a ſhip-owner like a victualler may ſo deal with the property as that a ſingle act may make him a trader, provided it appears, that he was doing that act with a view to do it over and over again, as long as he could find any one to trade with him. It is ſaid, the petitioner bought coals from the fitters, and ſold them, ſending them by this ſhip to market. That is all miſtake; and ſhews the danger of founding a Commiſſion upon ſuch ſtale tranſactions. The courſe of the trade is, that the coal-owner uſually employs the fitter; who hands the coals over to the perſon, who buys or freights them from the coal-owner. He ſtands in this ſituation: if *A.* purchaſes the coals, he is anſwerable for the price to the coal-owner: if *B.* has freighted the coals, as that is carried on through the medium of the fitter, he becomes anſwerable, that the freighter ſhall ſatisfy the coal-owner. He deals with the freighter, and hands over what he receives from the freighter to the coal-owner. It happens, that one of the owners has a ſhare in the ſhip. One of the freighters being in the partnerſhip, it is obvious, that individual, who is one of the partners, ſhould account for the freight; though the fitter would, if it had been the caſe of a ſtranger.

The reaſon, the lying two months in priſon upon an arreſt for debt is an act of bankruptcy, is, that you can preſume from that circumſtance, that he is inſolvent. The words of the *Act* are very particular. The petitioner has a right to the conſtruction of the Court upon it, and to deſire to be delivered from this proceſs in the firſt inſtance. The arreſt is the firſt thing to conſtitute the act. The arreſt for debt affords the preſumption. There is no preſumption of inſolvency, if nothing but the pardon of the Crown can deliver the party. He muſt lie in priſon, whether in debt, or not.

Then ſhall this petitioner, who is neither proved a trader, nor ſatisfactorily proved to owe the debt, and who upon this conſtruction of the *Act* is proved not to have committed an act of bankruptcy, be laid under the neceſſity of proving theſe facts in a court of law?

Lord CHANCELLOR.—The ſame idea, that at firſt ſtruck the Counſel on both ſides, that this was a Commiſſion colluſively taken out, alſo made a ſtrong impreſſion on my mind, when I firſt heard of this Commiſſion. Not a great while before we parted previouſly to the vacation the Commiſſion had occurred againſt Mr. *May.* It was carried on to a very conſiderable extent; and was evidently not to be ſupported, upon that ground, that it was a colluſive Commiſſion. It made the more impreſſion therefore upon my mind to find the name of Mr. *Bowes* occurring with a Commiſſion of bankruptcy. It was firſt pointed out to me by a very reſpectable Judge; who had ſeen it in the newſpapers; and the impreſſion upon his mind was, that the Commiſſion was of the ſame ſort. I thought it neceſſary for the credit of the Court to make a very ſtrict inquiry upon my own motion. The impreſſion remained very ſtrongly on my mind notwithſtanding the appearance of oppoſition to the Commiſſion. An application was made before the Commiſſioners on the part of Mr. *Bowes* to oppoſe the iſſuing of the Commiſſion. That did not ſatisfy me. It might have been a degree of management in appearing to oppoſe for the purpoſe of carrying on the deſign. But I am now perfectly ſatisfied, that my imagination was in this caſe groundleſs; though there was much probability of it.

I am extremely well ſatisfied, that the Commiſſioners, who, I thought, had by that contrivance been impoſed upon, though I think they were miſtaken, were not wanting in every degree of attention and diligence. I did impute to them ſome degree of negligence in not looking ſtrictly into the circumſtances. As to the debt, ariſing upon a balance of accounts, they proceeded firſt upon the common affidavit. Then they examined *Peacock* particularly to it. It ſtruck me, they had not inquired, at what time any given ſum was due. They had repeated ſittings. The principal object of their deliberations was the trading. They were not ſatisfied with the firſt evidence. Better evidence, they were told, might be produced; and all, that has been now produced, was brought out bit by bit. At laſt they were perſuaded, that there was a ſufficient trading. I have therefore great ſatisfaction in doing juſtice to their conduct. They were miſled; but by a ſpecies of evidence extremely likely to have impoſed upon them. They had no opportunity to canvaſs it on both ſides; and the evidence might lead them to conclude, that there was ſomething of perſonal trading; becauſe by the means of the perſon, whom here we ſhould call the huſband, the ſhip had been engaged in a courſe of trade. It is clear, the petitioner ſtood in no other relation to the ſhip than as part-owner; perfectly unknowing by any intervention of his own, how the ſhip was uſed; but taking it for granted, that the huſband would not let her lie idle; and taking his dividend of the freight. He had the ſame intereſt in one or two other ſhips. It is not neceſſary to ſpend many words in ſhewing, that does not make a man ſubject to the Bankrupt Laws. A perſon taking a ſhare in a ſhip does not appear to the world as a trader. He has more or leſs intereſt for his money, generally very little. There is no dealing with any one. He buys nothing: he ſells nothing. If a doubt is entertained upon it, it is very neceſſary, that it ſhould be diſſipated; for there are a thouſand people, who have no idea, they are liable to the Bankrupt Laws by having ſuch an intereſt.

But I am perfectly ſatisfied, that, though this is an adverſe Commiſſion, and not liable to the imputation of being a practice upon the Great Seal for the purpoſe of colluſion, it is highly my duty to ſuperſede this Commiſſion. The circumſtances are theſe. The petitioning creditor by his own ſtatement is a perſon, whoſe debt accrued in a courſe of agency with the bankrupt in long money tranſactions: but it was an agency of ſuch a nature, that there ought to have been a clear and diſtinct account between him and his principal. The principal has brought an action, and has made an affidavit of a debt due to him. He has alſo filed a bill for an account; there being no clear account between them. An anſwer was put in; and then this perſon, who, if he is a creditor, is conſtituted creditor by that courſe of dealing, takes out the commiſſion. If it is to be ſupported, it muſt be upon an act of bankruptcy committed in 1787: an act of bankruptcy of perfect notoriety; for it is ſuppoſed to be lying two months in priſon upon the impriſonment of Mr. *Bowes* in 1787; the conſequence of that being, that all tranſactions of the bankrupt are invalid ſince 1787; and this creditor muſt have been, and he ſtates himſelf to have been, a creditor antecedently to that period. Therefore it is not upon the face of it a caſe, in which the general relief of creditors is the object of the Commiſſion, but a particular

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queſtion between *Peacock* and *Bowes*, which inſtead of being to be determined upon the reſult of an account in this court, or in an action, if the diſcovery obtained by Mr. *Bowes*'s bill has given a foundation for that, is to be decided in a bankruptcy, of which obviouſly *Peacock* muſt be able to give himſelf the whole management. But there is great miſchief in the relation, the law is obliged to give; and when that is puſhed to a vaſt extent, it becomes this Court to take care, that in a caſe, which, it is plain and obvious, muſt be of vaſt confuſion and intricacy in all ſubſequent tranſactions for the period of eleven years, the Bankrupt Laws ſhall not, inſtead of being remedial and beneficial, be perverted to purpoſes of vexation and miſchief to the public; and the Court has a right to ſay that to a creditor, who might, if he could proceed upon the Bankrupt Laws, have taken that ſtep ten years and a half ago. According to the principles, upon which the Court acts in bankruptcy, I am perfectly juſtified in ſtating this to be an abuſe of the Bankrupt Laws.

I have very conſiderable doubt alſo, whether upon the conſtruction of the Bankrupt Laws it is not of eſſential neceſſity, that the lying two months in priſon ſhould be upon a caſe of impriſonment founded in debt and nothing elſe; for it is obvious, the reaſon, that induced the Legiſlature to conſtitute that ſpecific act of bankruptcy, was the preſumption of inſolvency; that the affairs of the man were in ſuch confuſion, that the beſt method of ſettling them would be that ſummary proceeding. But it appears to me, the Legiſlature meant it to be a caſe of impriſonment for debt; and the Legiſlature could not, I think, have expreſſed itſelf more clearly. It is very clear, as ſtated by the *Attorney General*, that if a debtor is committed upon a criminal proceeding, and afterwards diſcharges the debt, he is ſtill liable to the impriſonment upon the criminal proceſs; and therefore the preſumption fails. But without regard to that point, I deſire to be underſtood, that my ground in ſuperſeding this commiſſion is the vaſt length of time; the act of bankruptcy being of perfect notoriety; the commiſſion being founded upon the debt of a creditor, who muſt of neceſſity gain the whole direction of the commiſſion, and upon an act of bankruptcy, which ſubſiſted near eleven years ago; and after a ſuit inſtituted in this Court for an account againſt the petitioning creditor by the bankrupt, and a debt proved by the bankrupt as much as the debt againſt him by the petitioning creditor.

ditor. The Commiſſion therefore is evidently not taken out for the benefit of the creditors in general, but as a proceeding in the diſpute between theſe two perſons.

Superſede the Commiſſion at the expence of the petitioning creditor.

A ſingular circumſtance occurred in this bankruptcy. The affidavit upon ſtriking the docket was produced in the firſt inſtance before the Commiſſioners: but *Peacock* was examined; and in the depoſition, he has made to the debt, it has happened, that by the effect of blotting and interlining, there is no depoſition, upon which there could be a charge; for they have taken down an odd ſum; and upon ſome recollection, I ſuppoſe, it was not thought the exact ſum; and it is ſtruck out, and another ſum interlined; and in the interlining they have left out the word "*Pounds*". I dare ſay, it was by accident: but no proceeding could have been taken upon it. The Clerk of the Commiſſion commonly, I ſuppoſe, till the choice of aſſignees is the perſon employed to ſue it out; and he probably filled up the depoſition.

I hope, the buſineſs upon Commiſſions of bankruptcy will not in any part of it be done in a hurry. Particularly the finding the party a bankrupt requires great caution. The Commiſſioners ſhould in all caſes inquire with more ſtrictneſs, than has been uſual, into the debt of the petitioning creditor; for it is the foundation of the whole.

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Teſtatrix gave nine legacies of 1000*l.* each, part of 14500*l.* *South-ſea* Annuities; and as to the reſidue of the ſaid fund and all other her perſonal eſtate, including ſuch of the ſaid legacies as ſhould lapſe by death before they ſhould be transferable, upon truſt to convert into money ſuch part of her reſiduary perſonal eſtate as ſhall not conſiſt of *South-ſea* Annuities, and inveſt ſuch money with any money belonging to her at her deceaſe in ſaid fund of *South-ſea* Annuities and from time to time inveſt the dividends, &c. of all ſuch *South-ſea* Annuities as ſhall conſtitute her reſiduary perſonal eſtate in the ſame fund till the youngeſt of ſaid legatees ſhall, or would, if living, have attained twenty-one; and then to transfer the whole of ſuch *South-ſea* Annuities to ſaid nine legatees equally; with ſuch ſurvivorſhip as their original ſhares: the nine legacies of 1000*l.* each only are ſpecific; the remainder of the *South-ſea* Annuities is part of the general perſonal eſtate.

By a ſettlement previous to the marriage of *Jeremiah* and *Philippa Bright*, dated the 27th of *October* 1792, an abſolute power was given to *Philippa Bright* of diſpoſing by her will of the ſum of 14500*l.* New *South-ſea* Annuities; which were transferred to truſtees previouſly to and in contemplation of the marriage.

Philippa Bright, having ſurvived her huſband, by her will, dated the 3d of *November* 1794, reciting the ſettlement, in purſuance and by virtue of the power given to her by the ſaid indenture and all other powers, *&c*, directed and appointed, that the truſtees of the 14500*l.* New *South-ſea* Annuities ſhould as ſoon as conveniently might be after her deceaſe transfer the ſame to her executors; and that they ſhould ſtand poſſeſſed thereof upon the following truſts: *viz.* upon truſt forthwith to transfer the ſum of 1000*l.* New *South-ſea* Annuities part thereof to her Grandſon *John Richardſon;* 1000*l.* like Annuities other part thereof to her Grandſon *William Richardſon;* 1000*l.* like Annuities other part of the ſaid ſum of 14500*l.* *South-ſea* Annuities to each of her Grandſons *Francis Richardſon* and *Warwick Calmady Richardſon*, that ſhould attain the age of twenty-one years; and the like ſum of 1000*l.* New *South-ſea* Annuities other part of ſaid 14500*l.* New *South-ſea* Annuities to each of her Granddaughters *Cecilia Richardſon*, *Philippa Richardſon*, *Honor Calmady Richardſon*, *Grace Calmady Richardſon*, and *Amelia Auguſta Richardſon*, that ſhould attain the age of twenty-one years or be married which ſhould firſt happen.

The teſtatrix directed, that the dividends or intereſt of the reſpective legacies or portions of her ſaid two minor Grandſons *Francis Richardſon* and *Warwick Calmady Richardſon* and of all her ſaid Granddaughters ſhould from time to time be inveſted in the like fund of New *South-ſea* Annuities, ſo as to cauſe as great an accumulation thereof as reaſonably may be, until the capital of ſuch reſpective legacies ſhould reſpectively become transferable; and that ſuch accumulation ſhould be conſidered as part of, and be transferred together with, the original portion or legacy, from which the ſame ſhould have proceeded:

“And as to the reſidue of the ſaid 14500*l.* New *South-ſea* Annuities and all other my perſonal eſtate and effects whatſoever and whereſoever meaning to include ſuch if any of the legacies or portions hereinbefore given or intended for my Grandchildren and the accumulations thereof as may become lapſed by the deaths of the reſpective legatees before the ſame reſpectively ſhall become transferable as aforeſaid” the teſtatrix directed, that her executors ſhould ſtand poſſeſſed of the ſame, upon truſt, that they ſhall “as ſoon as conveniently may be after my deceaſe convert into money ſuch part of my reſiduary perſonal eſtate as

" ſhall not conſiſt of New *South-ſea* Annuities, and do and ſhall " inveſt ſuch money together with any money that ſhall be due " or belonging to me at my deceaſe, in the ſaid fund of New " *South-ſea* Annuities; and do and ſhall from time to time inveſt " the dividends or intereſt of all ſuch New *South-ſea* Annuities as " ſhall conſtitute my reſiduary perſonal eſtate in the ſame fund, ſo " as to cauſe as great an accumulation thereof as reaſonably may " be, until the youngeſt of my ſaid Grandchildren ſhall have attained the age of twenty-one years, or would, if living, have " attained that age; and then do and ſhall transfer the whole " of ſuch New *South-ſea* Annuities unto my ſaid nine Grand- " children" (naming them again) in equal proportions, ſhare and ſhare alike: Provided, that in caſe either of them, the ſaid *Francis Richardſon* and *Warwick Calmady Richardſon* ſhall die under the age of twenty-one years, or any of her Granddaughters under the age of twenty-one without having been married, the ſhare or ſhares of ſuch of them ſo dying ſhall go to the other and others of her ſaid Grandſons and Granddaughters including the ſaid *John Richardſon* and *William Richardſon* in equal ſhares at ſuch ages or times and in ſuch manner as their reſpective original ſhares; and that every ſurviving or accruing ſhare of her ſaid Granddaughters and her two minor Grandſons ſhall from time to time again be ſubject to the like contingency or condition of accruer, as provided concerning their original ſhares.

The teſtatrix by a codicil, dated the 14th of *December* 1794 gave unto *Arabella Philippa Calmady* 1000*l.* *South-ſea* Stock to be transferred unto her at twenty-one or day of marriage, which ſhould firſt happen; and to *Philippa Richardſon* all her wearing apparel, plate, watches, and jewels; and directed her houſehold goods to be ſold for the payment of her debts; and the remainder to be laid out in ſtock for the benefit of her Grandchildren.

The bill was filed on behalf of the infant Grandchildren of the teſtatrix againſt the executors and the other Grandchildren and againſt *Arabella Philippa Calmady*; praying an account of the truſt fund of 14500*l.* New *South-ſea* Annuities; and that the ſame may be transferred to the Accountant General upon the truſts of the will, &c; and an account of the perſonal eſtate, &c.

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The queſtion aroſe upon the legacy given by the codicil to the defendant *Arabella Philippa Calmady*; who claimed to have 1000*l.*, part of the ſaid 14500*l.* *South-ſea* Annuities appropriated to the payment of her legacy: the teſtatrix not being poſſeſſed of any other *South-ſea* Stock.

Mr. Lloyd for the plaintiffs contended, that the diſpoſition of the whole fund of 14500*l.* *South-ſea* Annuities by the will was ſpecific; and there being no reference to or revocation of the will by the codicil, the defendant could not be entitled to any part of that fund.

Mr. Piggott for the defendant Arabella Philippa Calmady admitted, that the legacies of 1000*l.* each given by the will to the nine Grandchildren of the teſtatrix were ſpecific; but inſiſted, that the ſubſequent diſpoſition was reſiduary; and therefore the remainder of the *South-ſea* Annuities was part of the general perſonal eſtate of the teſtatrix, ſubject to the legacy of 1000*l.* *South-ſea* Stock given by the codicil to the defendant.

Maſter of the Rolls was clearly of opinion with the defendant; and declared, that the legacies of 1000*l.* *South-ſea* Annuities given by the will to each of the nine Grandchildren of the teſtatrix were ſpecific; but that 5500*l.* New *South-ſea* Annuities, the remainder of the truſt fund of 14500*l.* *South-ſea* Annuities, was part of the general perſonal eſtate not ſpecifically diſpoſed of; and that the legacy given by the codicil to *Arabella Philippa Calmady* of 1000*l.* *South-ſea* Stock was a pecuniary legacy, payable out of the ſaid reſidue of 5500*l.* *South-ſea* Annuities and the reſt of the general perſonal eſtate of the teſtatrix.

Nov. 12th, 13th.

The Duke of LEEDS *v.* The Earl of STRAFFORD.

Upon the bill of the lord a Commiſſion iſſued to diſtinguiſh copyhold lands within the manor, compriſed in Admittances produced, the laſt in 1693, from freehold, and compounded from uncompounded copyholds, and to aſcertain the boundaries; and if they cannot be diſtinguiſhed, to ſet out lands of the tenant, of equal value with ſo much of the copyhold lands as cannot be diſtinguiſhed.

ſee 6. Ves. Jun. 293.

THE bill ſtated, that the plaintiff and his anceſtors for a great number of years have been, and the plaintiff ſtill is, ſeiſed in fee of the manor of *Wakefield*, and as lords of the ſaid manor entitled to all the rights, privileges, &c, thereof. The lands within the manor are partly freehold, and partly copyhold holden of the ſaid manor; and the copyholds are of two ſorts; *viz.* copyholds compounded and copyholds uncompounded; the copyholds compounded being held by the annual Lord's rent or Grave rent, and fine certain of three year's Lord's rent upon every admittance, the owners of ſuch lands having formerly agreed with the Lord for a compoſition for having ſuch fines aſcertained in perpetuity; the uncompounded copyholds being copyholds held by annual rent and fines arbitrary at the will of the Lord. The manor has been immemorially divided into Graveſhips, compriſing two or three Townſhips. The office of the Grave is to collect the rents and pay them to the ſteward. All the copyhold lands were originally uncompounded. A compoſition took place with the Crown, the manor being then veſted in the Crown, about the beginning of the laſt century, upon petition by the defendants to an Information filed by the *Attorney General* in the Duchy Court of *Lancaſter*.

The bill farther ſtated, that the defendant Lord *Strafford* and his anceſtors have been poſſeſſed for many years paſt of conſiderable copyhold premiſes ſituate in the manor; the greateſt part being uncompounded, and ſome ſmall part only compounded; and as the defendant alledges, alſo poſſeſſed of and entitled to freehold lands in the ſaid manor; and the ſaid freehold lands lie intermixed with the ſaid copyhold eſtates and premiſes without any boundaries or viſible diſtinguiſhing marks; which is much increaſed by the great length of time ſince the admittance of the laſt anceſtor or owner of the copyhold eſtates, though the ſame were conſtantly allowed to be copyhold held of the ſaid manor, and by ſeveral of thoſe admittances in ſucceſſion having been granted in general terms without any particular deſcription of the premiſes or the metes and boundaries thereof being preſented; which the owner neglected to preſent or make known. The laſt admittance now in the poſſeſſion of the Earl of *Strafford* is that of *Thomas Wentworth*, his grandfather's brother or anceſtor in the year 1693, upon the death of Sir *William Wentworth*, his father, of all and ſingular the cuſtomary meſſuages, cottages, cloſes, lands, tenements, rents, reverſions, and hereditaments, whatſoever, which late were the copyhold inheritance of Sir *William Wentworth*, and

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holden of the Lord of the ſaid manor by copy of Court roll, with the appurtenances ſituate within the Graveſhip of *Wakefield*, *&c.*; to hold to him, his heirs, and aſſigns for ever by rents and ſervices according to the cuſtom of the ſaid manor; and upon which ſuch admittance a fine of 83 *l.* 15 *s.* *viz.* 3 *l.* 15 *s.* for lands compounded, and 80 *l.* for lands uncompounded, was paid; and the ſame premiſes or ſome part or parts thereof are or is in the poſſeſſion of or claimed by the Earl of *Strafford*: but no admittance has been had ſince notwithſtanding many applications on the part of the plaintiff. The ſaid *Thomas Wentworth*, afterwards created Earl of *Strafford*, upon the 10th of *April* 1732 ſurrendered all his copyholds, whether compounded or uncompounded, within the plaintiff's manor to the uſe of his will; and he died in *November* 1739, leaving *William* his only ſon and heir at law and according to the cuſtom. The ſaid ſurrender was not brought into Court till 1740: nor does it appear by the Court rolls, that any will of the ſaid *Thomas* Earl of *Strafford* was ever produced; and *William*, late Earl of *Strafford*, was never admitted tenant; though he continued in poſſeſſion of the ſaid copyhold premiſes from the death of his father in 1739 till his own death in *March* 1791; and upon his death the preſent Earl, his heir, entered upon the ſaid copyhold eſtates, and has been ever ſince in poſſeſſion without being admitted. Many applications were made to the late Earl to be admitted, and to have the copyhold premiſes aſcertained and diſtinguiſhed from the freehold, and the compounded from the uncompounded. Certain copyhold rents were paid uniformly and conſtantly down to the year 1779 or 1780 for the ſaid premiſes; and the ſeveral perſons uniformly admitted, they were copyholders. Applications were alſo made to the preſent Earl.

The bill charged, that all the Earl of *Strafford*'s ſaid copyhold eſtates are uncompounded; that it is incumbent upon him, in caſe he claims any exemption from payment of uncompounded or arbitrary fines, and if he pretends, that any part of the ſaid eſtates is freehold, to aſcertain and diſtinguiſh the ſame, and deſcribe the boundaries, and upon what occaſion they became
2.1693 compounded. The admittance of 1793 contains lands nearly, if not fully, equal to the whole of the lands now holden or claimed by the preſent Earl of *Strafford* within the manor: but ſince that time various changes have taken place in the names of the

the fields and parcels of land, &c, and the boundaries and other diſtinguiſhing marks thereof, with the privity and aſſent and concurrence of the defendant and his anceſtors, and without the privity of the plaintiff and his anceſtors; but the defendant can alone diſtinguiſh and ſet forth the boundaries. From the length of time, change of names, boundaries, and other circumſtances, it is impracticable to the plaintiff to find out and aſcertain the poſſeſſions of the defendant within the manor without a diſcovery. Upon the admiſſion in 1693, which was to compounded and uncompounded copyholds indiſcriminately a fine of 3*l.* 15*s.* was paid for ſuch part as was alledged to be compounded, and a fine of 80*l.* for ſuch as was uncompounded.

The bill prayed a diſcovery; and that the parties entitled to the ſaid copyhold eſtates may come to be admitted; that an account may be taken of the fines due; and if any of the defendants ſhall pretend to have any freehold lands intermixed with or contiguous to the copyhold, or that the copyhold lands or any parts thereof are of the nature of compounded copyholds, that they may diſcover the boundaries and deſcriptions of ſuch freehold lands and compounded and uncompounded copyholds; and that, if neceſſary, a commiſſion may iſſue for the purpoſe of diſtinguiſhing the ſaid freehold lands from the copyhold, and the compounded copyholds from the uncompounded, and for dividing and marking the ſame out by proper metes and boundaries; and in caſe the boundaries have been ſo confounded, that the lands of the reſpective deſcriptions aforeſaid cannot be ſet out and aſcertained, then that out of the whole of the ſaid lands ſo much land may be ſet apart to anſwer the annual rents and fines as being of ſuch annual value at any time at which it appears from the deeds the copyholds were of an expreſſed annual value ſhall at the time be of proportionable annual value; and that a proper part of ſuch lands may be held as compounded, and a proper part as uncompounded, lands, in caſe the defendants are entitled to hold any part as compounded.

The defendant Lord *Strafford* by his anſwer ſtated, that he does not know, which of the lands held by him in the plaintiff's manor are freehold, and which copyhold; nor can he diſtinguiſh the compounded from the uncompounded, or ſet forth the particular deſcriptions and boundaries.

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The facts charged by the bill were eſtabliſhed by the evidence of perſons, who had been ſtewards of the manor: but they could not diſtinguiſh the copyhold lands nor the compounded from the uncompounded. The neglect to admit proceeded from the negligence of former ſtewards of the manor; one of whom was on that account diſmiſſed in 1780. A rent of 4*l.* 14*s.* 6*d.* *per annum* was paid in reſpect of Lord *Strafford*'s copyhold lands within the manor down to the year 1779.

Applications were made to Lord *Strafford*'s agent; who ſaid, Lord *Strafford* would pay the uſual fines in reſpect thereof, provided they could be aſcertained and diſtinguiſhed. In 1792 the defendant Lord *Strafford* upon an application by the ſteward ſaid, he ſhould inſiſt upon all his lands within the manor being freehold; profeſſing at the ſame time, that he was ready to be admitted to whatever the plaintiff could prove to be copyhold.

The late Earl of *Strafford* admitted in converſation with the ſteward, that he held the copyholds, and thought, he had been admitted, and that by ſome miſtake it was not entered upon the rolls; for the Lord's rents had been regularly paid; but he believed, they were ſome years in arrear; and he offered to pay the arrears.

Several letters from the late Earl of *Strafford* to the ſteward to the ſame effect were produced.

The witneſſes did not believe, there ever had been any infranchiſement.

Attorney General, *Solicitor General*, *and Mr. King*, *for the plaintiff* contended, that the Commiſſion ſhould iſſue, as much the beſt way of making the inquiry. They cited *Ambler*'s *caſe*, in the *Exchequer*, upon an information filed in 1770 by Mr. *Ambler* as grantee of the Crown of quit-rents in the manor of *Bray*: The Court had no doubt, that they were bound in the firſt inſtance to ſend a Commiſſion. In ſome caſes they did aſcertain the lands; in others they ſaid, they could not; but the anceſtors held ſubject to quit-rents. The Court ſaid, it was their duty to have diſtinguiſhed, out of what lands they were to iſſue; and therefore a portion of land ſhould be ſet out, to be ſubject to the quit-rents.

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Mr. Mansfield, Mr. Grant, and Mr. Grimwood for the defendants.—Upon this demand for a Commiſſion to endeavour to diſtinguiſh copyhold lands from freehold, and copyholds compounded from copyholds uncompounded, at the diſtance of a century, the Court will exerciſe its diſcretion. There is no inſtance of granting ſuch a Commiſſion at ſuch a diſtance of time and under ſuch circumſtances of confuſion. The evidence as to the late Earl does not amount to any thing like an expreſs admiſſion, that he held copyhold lands. It ſhews, he had a ſuſpicion: but it appears from the letters, that what he ſaid was only in anſwer to the applications upon the part of the Duke of *Leeds*, giving credit to their repreſentations. A probable ground muſt be laid to ſhew, a Commiſſion will further the ends of juſtice and aſcertain the rights of the parties. The plaintiff profeſſes, that by the neglect of his own ſtewards he is utterly unable to aſcertain his rights; that he cannot point out a ſingle acre, which is held of the manor; but that formerly there were lands held by Lord *Strafford* of the manor. All the evidence for the plaintiff is merely of converſations with the late Earl of *Strafford*, and letters, from which it is inferred, that there muſt be ſome copyhold lands held of the manor: but they do not profeſs to be able to point out any one field in that ſituation. The Court may be ſatisfied, that a party has ſome right, if he has evidence of it: but if they have been ſo negligent as to loſe all evidence of their rights, how can the Court aſſiſt them? The principle muſt be mere conjecture. The plaintiff ſtates, that he has no knowledge upon the ſubject. The defendant and the witneſſes have ſworn, they have none. The correſpondence throws no more light upon it. At this diſtance of time an infranchiſement muſt be preſumed.

Lord CHANCELLOR.—The bill aſſumes, that the plaintiff knows, there are copyhold lands; but that he does not know the boundaries; becauſe they are confounded with freehold lands and changed; and therefore he cannot exerciſe his legal right. It is the duty of the tenant to keep the boundaries. That is the foundation of the bill. The confuſion of boundaries does not infer any negligence on the part of the lord; for the tenant is in poſſeſſion of the land. The evidence of the converſation of the late Earl of *Strafford* is the admiſſion of a tenant, that he holds copyhold lands. There is a diſcuſſion about the arrear of rent. What is there to ground any preſumption of infranchiſement upon? There are only two events, the deaths of the two Lord *Straffords*, the only two periods, at which there could be any inquiry about it. The boundaries are neceſſarily greatly confuſed: but there are, I dare ſay, many people, who can name all theſe cloſes. The only thing, that can be done at preſent upon the bill, is to direct the Commiſſion.

Direct a Commiſſion to iſſue, to inquire, whether the defendant, the Earl of *Strafford*, is in poſſeſſion of any, and which, of the copyhold lands within the manor of *Wakefield*, to which *Thomas Wentworth* was admitted in 1693, &c. (ſtating the ſeveral admittances appearing in the cauſe); and let the Commiſſioners diſtinguiſh, which of the ſaid copyhold lands are compounded, and which are uncompounded, and diſtinguiſh the above copyhold lands from the freehold lands of the defendant within the ſaid manor; and aſcertain the boundaries thereof; and the Commiſſioners are to ſet out, diſtinguiſh, divide, and aſcertain, the ſame by metes and bounds accordingly; and if by reaſon of the confuſion of boundaries, or alteration of names, or any other circumſtances, the ſaid Commiſſioners ſhall not be able to diſtinguiſh or aſcertain the particular copyholds or any of them, in that caſe they are to ſet out an equal quantity of lands now in the poſſeſſion of the defendant the Earl of *Strafford* within the ſaid manor, as may be of equal value with the ſaid copyhold lands, or ſo much thereof as cannot be diſtinguiſhed or aſcertained as aforeſaid; with the uſual directions for all deeds, books, papers, and writings, to be produced before the Commiſſioners upon oath; and with liberty to them to examine witneſſes upon oath.

Nov. 21ſt, 22d.

MATTHEWS *v.* WARNER.

Commiſſion of Review granted upon a ſentence of the Court of Delegates affirming a ſentence of the Prerogative Court eſtabliſhing a will.

William Matthews, late principal ſtorekeeper of his Majeſty's dock-yard at *Deptford*, died on the 8th of *April* 1790, about the age of Eighty; leaving the following teſtamentary papers:

"2d *Nov*r. 1785. A Plan of a Will propoſed to be drawn out "as the laſt Teſtament of William Matthews, Storekeeper of His "Majys Yard at Deptford —— After the uſual Prelude, being in

Note, that this paper of 2d Nov. 1785 was above 4 years & an half before the supposed testator's death.

“Health, ſound of Mind, &c. Imprimis I give unto Miſs Iſſabella Johnſon, Daughter of my good Friend Edwd Johnſon, Eſq; of the Lottery Office, the Sum of Sixty Pounds pr Ann. for her natural Life, to be paid her Half-yearly, out of the Dividends ariſing for Intereſt of the ſeveral Navy Bills I have lately ſubſcribed in the 5 pr Cts and Twenty Pounds for Mourning, and alſo One Hundred Pounds to my aforeſaid good Friend Mr. Johnſon, if I die before him. After the Death of Miſs Johnſon, the Capital, with what other the 5 pr Ct Stock I may have, I bequeath to Holland Ann L'Epine and Maria L'Epine, Siſters, Daughters of my good Friend Edwd L'Epine Eſq; in an equal Diviſion between them, and if one dies unmarried, the whole to deſcend to the Survivor, and if both dies unmarried, or without Children, to deſcend to the children of my Firſt Couſin John Fiſher Clerk, formerly of Bodmyn, Cornwall, and to my Firſt Couſin Timothy Slade of Ledbury, to be divided equal between them. My Houſehold Goods to be ſold in Part, unleſs ſufficient Moneys can be found to pay my Debts and Legacies. My Plate, and what they chuſe to ſave of my Houſehold Goods, I bequeath to Holland Ann L'Epine and her Siſter Maria, to be divided between them; to whom I alſo leave all the Reſidue of my Fortune or Effects, after giving One Hundred Pounds to my good Friend Mr L'Epine, and alſo One Hundred Pounds to my late Son-in-Law Iſaac Warner. Muſt pray my Burial may be very plain and not expenſive; could like to be buried, with the Warners' Permiſſion, with my dear Girl, in their Vault, Leigh Church, but by no Means to be buried at the Old Church, Deptford. I appoint my good Friend Mr. Edwd L'Epine and my good Friend Mr. Edwd Johnſon, my Executors, to ſee this my laſt Will and Teſtament complied with. Dated at Deptford, 2d Octr 1785. Wm Matthews.

“I muſt not forget my good
“Friends Miſs Mary and Miſs
“Charlotte Howell, who deſire
“will eccept of
“Five Guineas each for Ring to wear in Remembrance of me: 6th Octr. 1785. Wm Matthews”

This paper was indorſed thus:
“2d Octr 1785
“A Plan deſigned for the laſt
“Will and Teſtament of
“Willm Matthews, Storekeeper of His Majys
“Yard,
“Deptford.”

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Note, that this paper of 27. Dec.r 1789. was between 3 & 4 months supposed before Testator's death.

The other paper was as follows:

“27th Decr. 1789.

“Finding myſelf in a very precarious State of Health, the following is the Plan I propoſe to dray Will from, abrogating all the others I have already drawn out. IMPRIMIS, I give to Miſs Iſabella and Catherine Jones, both of Eltham, One Thouſand Pounds 5 pr Cents. to be divided between them equally, being a legacy I always intended for their Aunt Iſabella Johnſon, for her great Friendſhip of her's and her father's always ſhewed towards me; to Mrs Jones, the Mother of the young Ladies, I bequeath One Hundd 5 pr Cts; to Iſaac Warner, my late Son-in-Law, One Hundred; to Matthew, his Son and my Godſon, One Hundred. I give to Mr. John Clewer at Botley, and ”

The former of theſe papers is written on a piece of official paper interſected with lines, containing printed at the top the different articles, of which the Deceaſed in his ſituation of ſtorekeeper had the care; and the latter is written on the back of a letter addreſſed to the Deceaſed.

Both of them were in the hand-writing of the Deceaſed. The former was found in the Deceaſed's office in the dock-yard, looſe in his deſk, in which there alſo appeared ſome official papers: the latter was found in the Deceaſed's bureau in the parlour of his dwelling-houſe in the dock-yard, in a bundle of letters and papers.

Edward Johnſon died in *November* 1787. *Edward L'Epine* died ſome months afterwards, and *Iſabella Johnſon* in *March* 1788. *Holland Ann L'Epine* about a year and an half before her father's death married Captain *Montague*, and died without leaving any child about three months afterwards. *Maria L'Epine* ſoon after her father's death became inſane without hopes of recovery.

Caveats were entered on the part of ſeveral perſons, claiming as next of kin to the Deceaſed, and of others, claiming as legatees under theſe inſtruments; and a ſuit was inſtituted in the Prerogative Court of *Canterbury*.

The following evidence as to the intention and declarations of the Deceaſed was produced in the cauſe:

Alicha Jones depoſed, that the Deceaſed for three or four years before his death frequently told Deponent, he would at his death remember her daughters *Iſabella Ann*, and *Catherine Frances Jones*; and ſhe once ſaw in Doctors Commons an original will of the Deceaſed, wherein *Edward L'Epine* and *Edward Johnſon*, Deponent's father, were named executors; but knows not the date of it. She obſerved, *Iſabella Johnſon* was mentioned in the ſaid will, which ſhe read, as aforeſaid, as a legatee in the ſum of One Thouſand Pounds Five *per Cent.* in the Bank of *England*; and that *Holland Ann L'Epine* and *Maria L'Epine* were appointed reſiduary legatees therein. The Deceaſed with the Deponent attended the funerals of *Edward* and *Iſabella Johnſon*; and ſhe heard him ſpeak of the deaths of *Edward L'Epine* and Mrs. *Montague*; and he ſeveral times ſpoke to Deponent before the 27th of *December* 1789 of the inſanity of *Maria L'Epine*, how bad ſhe was; and that he was afraid, ſhe would never get the better of it.

On a *Sunday* in *February* 1790 the Deceaſed told Deponent in a private converſation with her, that he was very ill, and was going; and he expreſſed the regard he had for her father and ſiſter, and for her daughters, as knowing them when infants; and he then told her, that he had by a former will left her ſiſter One Thouſand Pounds Five *per Cent.* which he had divided between her Daughters, Five Hundred Pounds apiece, and ſomething to the Deponent, to buy her a black bow.

The Deceaſed was in a declining ſtate of health from the 27th of *December* 1789; and he complained of weakneſs in his fingers between ſaid time and his death, ſo that he could not write; and ſeveral times, down to the laſt time of her ſeeing him, he ſaid, he believed, he muſt get ſomebody to finiſh his will; for that he could not. He always expreſſed great affection for *Maria L'Epine*. Since ſhe became deranged he has frequently declared, it was not his intention to leave her any part of his property; that ſhe was already in poſſeſſion of a great fortune amounting to 70000*l.*; that ſhe could not from the ſituation ſhe was then in poſſibly enjoy the income, ſhe then had; that her father had uſed him very ill; and ſhe did not ſtand in need of his aſſiſtance.

Louiſa Henſob confirmed the Deceaſed's knowledge of the deaths of the perſons mentioned in the laſt depoſition; and ſaid, ſhe frequently heard him till about four years before his death ſpeak of *Iſabella Johnſon* being a legatee and ſaid Miſs *L'Epines* being reſiduary legatees in his will; and frequently until about three or four months before his death heard him ſpeak of *Maria L'Epine* being inſane without hopes of recovery; and thinks, ſhe heard him ſpeak of ſame prior to the 27th of *December* 1789. The Deceaſed ſeveral times, long after the 27th of *December* 1789 when deponent was on a viſit at his houſe, and they were alone, told her, he had left the Miſs *Jones*'s Five Hundred Pounds apiece and One Hundred Pounds to Mrs. *Jones*; and alſo named Mr. *Warner*; to whom he ſaid, he left One Hundred Pounds, and One Hundred Pounds to one of his ſons; and ſaid, he had placed Mrs. *Jones* in the place, in which he had formerly placed her father Mr. *Johnſon*.

The ſame witneſs ſaid, that the Deceaſed appeared to have a great regard and affection for *Maria L'Epine*; that after ſhe became of unſound mind he ſeveral times declared to Deponent and in her preſence, that as *Maria L'Epine* was deprived of the right uſe of her underſtanding, he did not intend to leave her any thing at his death; that ſhe could not want for any thing; for ſhe had already a fortune amounting to 60000*l.*; and ſhould he add any thing to it, ſhe could not enjoy it.

Jennet Johnes, ſervant to the Deceaſed, depoſed, that a day before his death being ſent to the bureau in his parlour upon unlocking it ſhe ſaw the teſtamentary paper, dated the 27th of *December* 1789; which ſhe read; and ſhe obſerved money, and a bank-note, with a draft of the Deceaſed's, in the ſaid bureau; and he always appeared to her to keep his papers of the greateſt moment and concern in the ſaid bureau.

For twelve months prior to the Deceaſed's death, until about three months before his death, he many times told the Deponent, that he would leave the two Miſs *Jones*'s very handſome. Within the laſt year he often complained, that *Edward L'Epine* had not uſed him well; for he had promiſed, or the Deceaſed expected, he would have left him at leaſt 300*l.* a-year; but he had only left him 100*l.* for mourning; and that it appeared by *Edward L'Epine*'s papers, that the Deceaſed was indebted to him 200*l.*; and he did not believe, he was in any manner indebted to him; and on ſuch occaſions, and until within a fortnight of his death the Deceaſed at ſeveral different times added, he ſhould not for-

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get *Edward L'Epine*'s conduct; and as *Maria L'Epine* was by her father left a fortune of between 50 and 60000*l.*, which ſhe could not poſſibly enjoy, being out of her ſenſes, and as ſhe did not ſtand in need of his aſſiſtance, he was determined, no part of his property ſhould ever go to *Maria L'Epine* or to any one of *Edward L'Epine*'s family. From *Saturday* to *Wedneſday* immediately before the Deceaſed's death, which happened on *Thurſday*, the Deponent at different times heard him, when ſpeaking to his ſervant *Joſeph Ardern*, declare, that he had not made his will; and at ſuch times he added, that he would not or could not then do it, or to that effect. She always underſtood from the Deceaſed, and believes, that he kept all his own private papers of conſequence in his bureau in the dining parlour of his dwelling-houſe, and not in his Office.

Ann Ougſton depoſed, that the Deceaſed frequently declared to Deponent, and to *Louiſa Heuſch*, her niece, after the ſummer of 1789 up to the time of his death, that he had left Miſs *Jones*'s a legacy, he had given by a former will to their aunt Mrs. *Johnſon*. He kept papers of the greateſt moment and concern in the bureau, in which the paper, dated the 27th of *December* 1789, was found. He frequently ſhed tears at the circumſtance of the inſanity of *Maria L'Epine*, and expreſſed the ſame as being without hope of recovery. The Deceaſed was very weak in body and looked very ill for four or five months before his death; and Deponent frequently heard him ſay, he did not like to write, and he ſeemed to be in pain when he wrote, for two or three months before his death; and he told Deponent, it was the hardeſt taſk, ſhe had put him to, to anſwer a letter from her about three weeks before his death. After *Maria L'Epine* became of unſound mind, he frequently declared, he did not intend to leave her any part of his property; that ſhe had a fortune, which would ſupport her in a handſome manner for the condition ſhe was in.

John Symonds, who was preſent, when the teſtamentary paper, dated the 27th of *December* 1789 was found in one of the pigeon-holes of the bureau, depoſed, that there were in the ſaid bureau a great number of private letters, bills, and receipts for money paid, and alſo a mortgage deed, with ſome other papers.

Elizabeth Humphreys depoſed as to the great regard and affection expreſſed by the Deceaſed for *Maria L'Epine*, eſpecially after ſhe became inſane: that he often ſaid, he looked upon her and her ſiſter as his daughters. He frequently declared till Mrs. *Montague*'s death, that he had left her and her ſiſter *Maria L'Epine* the whole of his property; and after her death until *December* he ſeveral times declared, that *Maria L'Epine* ſhould have the whole of his property.

The evidence of *John Fox*, the Attorney of the Deceaſed, was to the ſame effect; that the Deceaſed till the time of his death always expreſſed great affection for *Maria L'Epine* and her ſiſter; and declared, that though their father had diſappointed him in the diſpoſition of his property, (of which he often complained,) that ſhould make no difference; that he always intended, they ſhould have the whole of what he had; that he always conſidered them as his girls; and that he had the bringing them up.

There was farther evidence of the Deceaſed's regard for *Maria L'Epine*, and his concern at her malady; particularly ſome letters, that he wrote upon that ſubject.

Joſeph Ardern, footman to the Deceaſed, gave the ſame account as *Jennet Johnes* of the complaints of the Deceaſed of Mr. *L'Epine*'s conduct; and that the Deceaſed frequently ſaid to the Deponent from *February* 1790, when the Deponent at the requeſt of the Deceaſed returned to his ſervice, until within ten days of his death, that he would not leave *Maria L'Epine* any thing; as ſhe did not ſtand in need of it, being out of her ſenſes, and poſſeſſing a fortune of near 50000*l.* from her father; and he was determined, neither ſhe nor any of her family ſhould have any part of his property. On the *Friday* before his death the Deceaſed, when in the carriage with the Deponent, declared, he had not yet ſettled his affairs, and that he had not made his will. The Deponent then requeſted him to ſend for his ſon in law Mr. *Warner*, and to conſult with him about ſettling his affairs: The Deceaſed replied, in a haſty manner and with an oath, that he did not want Mr. *Warner* or any other perſon; for he would not make a will. On the *Sunday* before his death Mr. *Warner* came to ſee him; and on his leaving the houſe the Deceaſed aſked, who ſent for him, and the Deponent anſwering, that he did, the Deceaſed ſaid, he did not want Mr. *Warner* or any one;

that he had not ſettled his affairs, or he had not made his will; and that he would not do it; and on the *Tueſday* before his death he repeated his declaration, that he had not made his will. He never kept any of his own private papers of conſequence in his deſk in his Office; but at all times locked them up in a bureau in the dining parlour in his private houſe.

John Whybrew, gardener to the Deceaſed, gave the ſame account as the laſt witneſs of the declarations of the Deceaſed as to *Maria L'Epine* and her family; and that within the laſt week or ten days of his death the Deponent heard him ſeveral times in converſation with *Ardern* declare, he had not ſettled his affairs, and he ſhould not, or could not. Deponent always underſtood, the deſk in the Office of the Deceaſed had been uſed by him ſolely for official purpoſes; and he never was accuſtomed to keep papers of conſequence there.

Elizabeth Soloven, who attended the Deceaſed as nurſe, depoſed, that within the laſt three or four days of his death being confined to his bed he ordered his keys to be brought, and ordered *Joſeph Ardern* to take great care of them; ſaying, that, when he was dead, there would be plenty of crocodiles crying about him; but that he *Joſeph Ardern* was not to mind them, and not to deliver the keys to any perſon whatever upon any account; and he added, that he had not ſettled his affairs, and that he then could not or ſhould not do it. Within the laſt week of his life and until within a day of his death *Joſeph Ardern* ſeveral times requeſted permiſſion to ſend for Mr. *Warner* or ſome other perſon to converſe with him reſpecting the ſettling his affairs and about making his will; to which the Deceaſed at all ſuch times replied in a firm and determined manner, that he did not want to conſult with any perſon upon the ſubject; that he had not made a will; and he could not or ſhould not then do it.

On the 8th of *July* 1793 the Judge of the Prerogative Court (a) pronounced againſt the validity of the paper, dated the 27th of *December* 1789, and for the validity of the paper, dated the 2d of *October* 1785, and of the codicil thereto, dated the 6th of that month.

(a) Sir *William Wynne*.

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Upon an appeal to the Court of Delegates (*a*) on behalf of *Richard Matthews*, one of the next of kin of the Deceaſed, from that part of the ſentence, which eſtabliſhed the will and codicil, dated the 2d and 6th of *October* 1785, the ſentence was affirmed on the 10th of *May* 1798.

A petition was preſented to the King in Council, on the part of the Appellant, who in the courſe of the proceedings before the Delegates had been admitted a pauper, praying a Commiſſion of Review; and by an order of Council, dated the 31ſt of *October* 1798, the petition was referred to the Lord Chancellor to report his opinion thereupon.

Attorney General, Dr. Battine (The King's Advocate in the Admiralty), Mr. Pemberton, and Mr. Bayley, in ſupport of the petition.—The right of granting a Commiſſion of Review will not be denied, when ſo many have been granted. It was not unuſual or infrequent in the latter end of the laſt Century. The Papers in the Regiſtry of the Delegates do not go farther back than 1666: but ſince that period twenty have been granted (*b*).

(*a*) Sir *Francis Buller*, Bart. Sir *Beaumont Hotham*, Mr. Juſtice *Heath*, Dr. *Swabey*, Dr. *Coote*, and Dr. *Parſon*.

(*b*) Commiſſions of Review were granted in the following inſtances:
1666. To *Elizabeth Lack*, Spinſter, reſpecting the will of *George Nicholſon*.
1670. — *Martha Goodſon*, as to grant of adminiſtration of the goods of *Chriſtopher Pole Stokes*.
Henry James, Clerk, as to the will of —— *Young*.
1673. — *Thomas Milward* in a cauſe of jactitation of marriage.
1674. — *Henry Jackſon*, Clerk.
1676. — *Henry Tuberville*, as to the nuncupative will of *George Tuberville*.
1680. — *Philip Herbert*, Clerk, in a cauſe of a legacy.
Bridget Hyde, in a cauſe of nullity of marriage.
1681. — *Chriſtopher Boone*, in a cauſe of inventory and account.
Mary Ireton, alias *Boſtock*, as to the will of *H. W. Boſtock*.
1682. — *Catherine Gounter*, Widow.
1688. — *Thomas Pyne* and *George Ude*; in a cauſe of revoking adminiſtration of the goods of *Thomas Mouton*, and granting probate of the will.
Anne Metcalf, in a cauſe of revoking adminiſtration of the goods of *Henry Maywood*, and granting probate of the will.
Huberton Hicks and *Martha Meggs*. The ſame as to the goods of *John Singleton*.
1690. — *Humphrey Wigan* and *William Blunt*, as to the will of *Jacob Pitt*.
1692. — *Anne Short* and others, in a teſtamentary cauſe.
1693. — *Francis Percy*, as to the will of *G. Doe*.
1694. — *Edward Paſſmore*, as to bringing in adminiſtration, and granting probate of the will of *Thomas Jones*.
1695. — *Granado Cheſter* and others, as to the will of *Philip Atkins*.
1698. — *George Maſon* and others, as to the will of *George Cook*.

In this Century four have been granted: *viz.*

In 1705. To *Francis Weedon*, as to the will of *Robert Weedon*.
Robert Worth, as to a will: but the name is not legible.

1733. — *Herbert Hyde*, as to the will of *Chriſtopher Maſon*, againſt Dr. *Calamy* and *William Limbery*, Executors.

1741. — Sir *George Savile* Bart. againſt Dame *Mary Savile*, in a cauſe of adultery.

In *November* 29 *Char.* 2. Upon an application for a Commiſſion of Review of two ſeveral ſentences of the Court of Admiralty, and confirmed by the Delegates, Lord *Nottingham* obſerved, as appears from a manuſcript note of his Lordſhip's, "It would be "abſurd, and tend to a failure of juſtice to take from the King "the *dernier reſort*, and lodge it in the Delegates. What were "this but to exhauſt the fountain of juſtice, and leave him with- "out power, who gives power to others, as a fountain doth "waters, *cumulative, non privative.*"

The right therefore cannot be denied; nor from the various precedents can the expediency; where there really exiſts ſufficient reaſon to ſuppoſe the ſentence erroneous, or even doubtful upon points of law.

The ſentence of the Court of Delegates appears upon the Minutes unanimous, and from the ſtyle of the Court in giving its ſentence privately it is a matter of great delicacy to hint, that there was any difference of opinion among the Judges. Great difficulties ſeem to oppoſe themſelves on either ſide; in preſuming to impeach the ſentence of the learned Judge of the Prerogative Court, appearing to be confirmed by the unanimous ſentence of the Delegates; or in ſurmiſing, that the Judges had not been unanimous. Circumſtances of this kind however ſometimes tranſpire; and there is great reaſon to ſuppoſe, that one of the moſt learned of the Bench and a very able Civilian were diſſentient; though it does not appear upon the proceedings.

There is the leſs delicacy in mentioning this; as in Lord *Nottingham*'s manuſcripts it appears, that a difference of opinion in the Court of Delegates was made the ground among others of the

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the petition before him in the caſe of *Cole* v. *Mordaunt* (*a*), 22d of *May*; 28 *Charles* 2. His Lordſhip's words are theſe:

"The Counſel for Mrs. *Cole* ſaid, that three of the Delegates
"differed from the other five; and it did not appear in the
"Minutes. The other ſide alledged, that the ſentence was *nemine*
"*diſſentiente præter* Sir *John Baker Head*; for ſix ſubſcribed their
"names: one of them differed; and the ſeventh, the Biſhop of
"*Durham*, gave no opinion at all, coming one morning rather
"too late: but I was of opinion, that the ſubſcription was no proof
"at all; and that it was done only for the ſake of conformity."

The difference of opinion of grave and learned Judges affords ample ground for reviſion. Beſides that, ſeveral important queſtions of Teſtamentary Law are involved; and the ſtake is very conſiderable: *viz.* 20000*l.* The queſtion was briefly, how far the *Statute of Frauds* bore upon this paper, ſo as to make the parol evidence inadmiſſible. Some of the Delegates were of opinion, that upon the face of the paper it was not a will: others, who were in favour of the judgment of the Prerogative Court, had as little doubt, that it was abſolutely on the face of it a will: they agreed, that if there was a doubt, whether a will or not, parol evidence ſhould be admitted: but thoſe, who ſupported the ſentence, thought there was none. The evidence was opened: but it was conſidered as being opened merely *De bene eſſe*; ſubject to the opinion of the Judges, whether this paper was on the face of it a will, or not.

This difference of ſentiment is the cleareſt proof of there being great doubt at leaſt; which is the ground, upon which it was agreed, the oral teſtimony ſhould be received in aid of the evi-

(*a*) This was a remarkable caſe. Mr. *Cole* at a very advanced age married a young woman; who during his life did not conduct herſelf with propriety. After his death ſhe ſet up a nuncupative will, ſaid to be made *in extremis*, by which the whole eſtate was given to her, in oppoſition to a written will made three years before the teſtator's death, giving 3000*l.* to charitable uſes. The nuncupation was proved by nine witneſſes. Upon the appeal to the Delegates from the ſentence of the Prerogative Court in favour of the written will Mrs. *Cole* offered to go to a trial at law in a feigned action; ſubmitting to be bound by the reſult. Upon the trial at the bar of the Court of King's Bench, it appeared, that moſt of the witneſſes for the nuncupation were perjured; and that Mrs. *Cole* was guilty of ſubornation. After that ſhe applied for a Commiſſion of Review; which was refuſed; and upon that occaſion Lord *Nottingham* ſaid "I hope to ſee one day a law, that "no written will ſhould be revoked but by writing."

This is ſaid to be the principal caſe, which gave riſe to the *Statute of Frauds*.

dence ariſing on the inſpection of the paper, that the Deceaſed by his own declaration and deſcription never intended it as a will.

The paper of 1789 was ſet aſide in the Prerogative Court; and there was no appeal from that part of the ſentence. The grounds, upon which the Court pronounced againſt that paper, were, that it was incomplete in form and in effect: the Deceaſed could not have made up his mind to it, or he would have finiſhed it; having ſufficient time, ſtrength, and opportunity, after the inception. The Teſtamentary Law as to imperfect or inchoate papers is, that if a party begins a teſtamentary paper, and leaves it broken off and unfiniſhed, having lived afterwards a ſufficient time in health to have completed it, if he thought proper, it muſt be preſumed in law, that he had either abandoned it, or had not finally made up his mind, that it ſhould take effect.

This doctrine has been univerſally received; and was particularly recognized in the caſe of *Griffin* v. *Griffin* (*a*); decided in 1790.

The Judge farther added, that, looking at the evidence, it appeared, this paper was entirely out of the conſideration of the Deceaſed; ſo that it was not ſuffered in any way to operate againſt the will of 1785 as a revocation. In reſpect of the paper, for which he pronounced, he ſaid, the queſtion was, whether it was a perfect paper, ſo that under the *Statute of Frauds* (*b*) no parol evidence could be admitted to ſhew, it ſhould not ſtand. He was of opinion, that it did come under the *Statute of Frauds*; and that oral declarations could not deſtroy ſuch a paper. It was

An unfiniſhed teſtamentary paper of no effect; the party having lived eight days afterwards.

(*a*) *Richard Griffin* executed a teſtamentary paper, dated the 27th of *September* 1777.

On the 18th of *January* 1789 he began a paper; and having written no more than the commencement of what he meant to do he was called away to dinner; and locked up the paper. On the 27th of the ſame month he died ſuddenly, while ſitting on the bench as a Juſtice of Peace.

The queſtions were, whether this unfiniſhed paper was a revocation of the former paper, executed in 1777; or whether it was to be eſtabliſhed ſubſtantively and conjunctively with the former paper.

It was determined, that the unfiniſhed paper could have no effect: the teſtator having lived eight days in health and capable of buſineſs, after he had begun that paper, and not having concluded it, the preſumption of law, even if there was no other paper, would have been, that he never meant to finiſh it; or that it was intended only as a draft for conſideration; and the caſe was ſtill ſtronger, as there was an executed paper.

(*b*) 29 *Char.* 2. *c.* 3.

complete and perfect in form and diſpoſition. It was in the hand-writing of the deceaſed. Executors were appointed; and the reſidue was diſpoſed of. It was alſo ſigned and dated. Certainly alterations had taken place in the Deceaſed's ſituation. The executors were dead. One reſiduary legatee was dead: the other was inſane; and moſt of the legatees were dead. Therefore though it was not the moſt rational diſpoſition, and not the complete intention of the Deceaſed, yet as he had not expreſſed a contrary intention by any paper ſufficient in law to revoke it, it muſt operate; and the Court was precluded by the *Statute* from admitting oral evidence.

The firſt queſtion is, whether parol evidence can be admitted to ſhew the intention, whether this paper ſhould operate as a will, or not. If it was clearly a will upon the face of it, it would be utterly inconſiſtent with the *Statute* to admit evidence to ſhew, the teſtator did not intend it to have any operation; for it could not be defeated by any nuncupative declaration (*a*).

In the very beginning of this paper there is *declaration plain* by the Deceaſed, that it is not that will, that he propoſed to make; but that it is a plan of a will, which he propoſed afterwards to draw out. As much is implied from the words, that immediately follow, which ſhew, the paper was meant, not for the will itſelf, but as a ſketch or deſign, "After the uſual pre-"lude, being in health, ſound of mind, *&c*," as from the former expreſſion, calling it a plan. A third declaration is expreſſed in theſe words: "Muſt pray, my burial may be very plain and "not expenſive:" He means, that will, he propoſes hereafter to make, muſt pray that.

If after the date "2d *October* 1785" he had added, "This," or "The above is a plan propoſed to be drawn out," would not that declaration have aſcertained the nature of the paper? Then is it not contrary to good ſenſe to make a diſtinction, becauſe the character of the paper happens to be given, not merely in the beginning of the paper, but alſo in the ſecond and third paſſages?

It is then ſaid, here is a codicil, dated the 6th of *October*. That is another *declaration plain*, that the former it not meant to be

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(*a*) 29 *Char.* 2. *c.* 3. § 22.

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a complete, efficacious, final, teſtamentary act; for not having in the interval drawn out his will according to the plan, from which he propoſed to draw it, he ſays, that whenever he ſhall execute that, which he has declared his purpoſe to execute, he muſt not forget thoſe particular perſons; and upon the back of this paper is a fifth declaration, that it is meant to be nothing but a plan.

Suppoſe, to thoſe words deſcribing the paper as a plan, he had added negative words, "but not for my will:" Could any doubt have ariſen of the intention? Theſe words being conceived in poſitive terms only, are equivalent. To declare that an actual preſent will, which its author has himſelf ſo repeatedly ſtamped with the denomination of mere deſign, mere propoſition, mere plan, for a future teſtament, would be a very ſtrong conſtruction.

It is impoſſible to deny, that evidence may be admitted to explain ſuch a paper. Suppoſe, within a quarter of a year after writing what is called the codicil, he had actually drawn out a will according to the plan: Could it not be proved by parol evidence, that he did in fact draw out a will, following that plan, and containing the uſual prelude, with the ſame directions for his burial, and the ſame legacies to the perſons mentioned in the codicil; and that he had indorſed it "The laſt will of *William* "*Matthews*?" That is like the caſe in Sir *Thomas Raymond*, 334. There is evidence, that he did make a will; perhaps a ſecond; and the probability is, that he deſtroyed both thoſe wills: but he did not think it neceſſary to deſtroy this paper. The evidence of Mrs. *Jones* proves, that a will had exiſted, varying from this plan in the legacy given to Mrs. *Johnſon*. The Deceaſed under his own hand in the ſubſequent paper of 1789 confirms that by mentioning a legacy to Mrs. *Johnſon* different from that in the plan. This deciſion eſtabliſhes this; that if a paper is drawn, expreſſed to be a plan for a will, and there are ſome paſſages in it, that would ſerve for a will, but if the fact is, that a complete will is afterwards made, and then the teſtator deſtroys the will, meaning to put an end both to the plan and the will, yet the nature of the remaining inſtrument is to be changed, merely becauſe in the manner of repreſenting his plan he has happened to make a diſpoſition, which would have done for a teſtamentary act, if that was what he intended. This deciſion confounds theſe two things: there are certain requiſites neceſſary to make a will; but I deny, that becauſe you find thoſe requiſites, the inſtrument muſt be a will.

The caſes of *Habberfield* v. *Browning* (*a*), 28th *June* 1773, and *Cobbold* v. *Baas* (*b*), 29th *November* 1781, before the Delegates,

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(*a*) *Catherine Lloyd*, an old Lady, wrote the following Letter, directed to *James Browning* Eſq. at his Chambers, Lincoln's Inn Square.

A Letter to an Attorney containing inſtructions for drawing a will eſtabliſhed as a will.

"I make no doubt Sr if what I am now going to ſay ſhou'd be poſſible to gain if I ſhoud recover this illneſs & if feſable with my inquiring & your help without great expence, but that you will think it worth my while and as I have the real Wrightings to produce and ſhall have more intelligence by a Perſon that is going down that has an Eſtate lying near Wooten Pilling that will ſend me a line that if ſuch perſons as are nominated do poſſeſs and reſide their I do hear the Perſon that I did employ was comanded to ſee again as being a very proper man & ſo great a Call as has been for He had ben in the King of Pruſſias ſevis and received a Shot thro his wright arm and by that got his diſcharge which He ſhew'd me—But in caſe of my demiſe I deſire you will draw up and leave ſome Blanks for ſome ſmall legacies that after my Funeral Charges are defrayed with decency then except ſome legacies I give and bequeath to John Browning Eſqre my dear and well beloved Couſin my Lands and Tenements Heriditaments att Wooten Pilling in the County of Bedford and alſo a Meſſage and Tenement lying in Bucklerſbury near the Manſion Houſe in the City of London and you by taking poſſeſſion will find my Wrightings to prove and alſo what Stock I ſhall have remaining in the ſaid John Browning Eſqre Hands—I am

&c yours

Cath Lloyd

"This you have under
my Hand, if any thing
ſhould happen before the Wrighting
is drawn up"

"If my aſſits will afford it to pay in the Burow of Southwark £ and to Miſs July Poney thirty Pounds Iſaac Apothecary a ſmall debt to Wheeler Baker in St Thomas's a ſmall debt to Remitt a Publican at the Red Lyon near the Church half his debt a Poor Milkwoman in Kent Street named Cater 1 „ 1 „ 0 Theſe all by Legacy by way of compoſition and to Margaret Shaw my Room of Goods and Sheets wearing aparell and all my beſt Linen Velvet Cloak & Capuchin & to Mary Burke that is now with me Shifts Bedgowns Petticoats & 5£. if ſhe is with me at my departure—To Mrs Barnardi 30 Shillings for a Ring and to your little Girl a little Cabinet & my Garnet Ring ſet with Diamonds & a large Table Spoons but pleaſe not put this Rigmaroll in till I ſend it correct—This only by way of Memorandum in caſe I ſhoud go off ſuddenly—Mary Skee ſomething for ſhe has uſed me ill"

This Paper was written *March* 1760. Mrs. *Lloyd* died on the 2d of *Auguſt* in the ſame year.

The Prerogative Court pronounced againſt this Paper, as being a Conditional Paper: the operation of it depending on the teſtatrix dying ſuddenly; whereas ſhe had time to make a formal will; and parol evidence was admitted.

The Court of Delegates, Sir *William Henry Aſhburſt*, Sir *George Nares*, Sir *James Marriot*, Dr. *Macham*, and Dr. *Bever*, reverſed the ſentence; and pronounced for the paper as the laſt will and teſtament of the Deceaſed; thinking it a perfect Paper and an abſolute diſpoſition.

A will diſpoſing both of real and perſonal property, with a clauſe of atteſtation, but no witneſſes, eſtabliſhed as to the perſonal property.

(*b*) *James Savage*, deceaſed, gave inſtructions to his Attorney to prepare a will for him. The Attorney prepared it with ſeveral *quæres* and abbreviations; and the Deceaſed made ſeveral

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gates, go no length to prove, that parol teſtimony is not to be admitted to ſhew, whether a paper is intended to be a will, or not. Theſe caſes do not apply; for upon the face of this paper it is not intended as a teſtamentary diſpoſition. There is no preſent diſpoſition. The Deceaſed never intended by ſigning it, that it ſhould immediately operate. There are many very ſenſible paſſages applicable to this ſubject in *Shep. Touch.* 404 to 408.

The paper, upon which this is written, the place, in which it was found, and the alterations, that took place as to the perſons named, ſtrongly confirm the clear reſult of the evidence given on the allegation of the next of kin, that the Deceaſed never intended this as his will.

Sir John Nicholl (Advocate General), and Mr. Grant, in ſupport of the Sentence.—This queſtion has been confined to a much narrower ground, than that, on which it ought to be conſidered; *viz.* the merits of the caſe, and even the mere point, whether parol evidence could be received. The grounds upon which His Majeſty's diſcretion is to be exerciſed are much more extenſive, with a view to the rights of the ſubject and the public expedience. It is exerciſed with a great degree of caution. A Commiſſion of Review does not belong to the ſubject as matter of right; but is adminiſtered *ex gratiâ & benignitate.* It does not iſſue of courſe.

ſeveral alterations and interlineations in the draft. He afterwards with his own hand wrote the ſaid will over fair from the ſaid draft; adding only a bequeſt of the reſidue; which he had not made in the draft; and he concluded, as follows:

"In witneſs whereof I have to this my laſt will and Teſtament contained in Three Sheets
"of Paper, to the firſt two whereof I have ſet my Hand and the laſt my Hand and Seal this
"   in the 16 Year of the Reign of our Sovereign George the third
"of Great Britain France and Ireland King defender of the faith and in the year of our
"Lord One thouſand Seven Hundred and Seventy Seven JAM^s SAVAGE. Signed
"ſealed publiſhed declared and delivered by the teſtator JAMES SAVAGE as and for his laſt
"Will and Teſtament in the preſence of us who have at his Requeſt and in preſence of each
"other ſet our names as Witneſſes Hereto"

The Deceaſed had ſubſcribed his name to each ſheet; and to the laſt ſheet he did affix his ſeal. The clauſe of atteſtation was not ſubſcribed by any witneſſes.

The paper was conſidered imperfect by Dr. *Calvert* on account of the clauſe of atteſtation not being witneſſed; and he admitted parol evidence; on which he ſet aſide the paper.

The Delegates, Sir *William Henry Aſhburſt*, Sir *Beaumont Hotham*, and Dr. *Macham*, were of opinion, that, it being a will both of real and perſonal property, it was *reddendo ſingula ſingulis* a perfect diſpoſition of perſonal eſtate, and therefore a good will; and they rejected parol teſtimony againſt it.

Applications of this kind have been very ſeldom made; and ſtill leſs frequently have they been ſucceſsful. Since the year 1705 only two have been ſucceſsful; the laſt in 1741. In the caſe of the ſhip *Hoogſcarpel*, at the Board of the Council, Lord *Camden* in giving judgment entered into the hiſtory and nature of theſe Commiſſions; and ſaid, this Prerogative is not to be countenanced; being the growth of baſe and deſpotic times; founded on the uſurpation of the powers aſſumed by the Emperors or the Church of *Rome*, and introducing expedience into the admiſtration of Juſtice.

As to the matter of right his Lordſhip ſaid, he believed, that would be the laſt application for ſuch a Commiſſion: at leaſt ſuch an application would never again be ſucceſsful. I ſtate this from an opinion of the late *Advocate General*; who was Counſel in the cauſe. Though that was a Prize cauſe, yet Lord *Camden* declared, it applied to all caſes of Commiſſions of Review whatever. If this is ſucceſsful, it will lead to ſuch applications in all caſes. There is great inconvenience in granting them.

Then as to the merits: it is not enough to raiſe doubts about the validity of the paper: if ſo, it would always depend upon the party's diſcretion. This caſe will probably never influence any other. There are no contradictory ſentences; but two concurrent ſentences. In *Savile* v. *Savile* all theſe circumſtances were ſtated by Lord *Hardwicke* as grounds to influence the diſcretion of the Crown. Firſt the weight of evidence was againſt the ſentence: Secondly, the queſtion had only been once heard and examined; for the Appeal to the Delegates was brought upon one preliminary point; and the courſe of that Court in ſuch a caſe is to take poſſeſſion of the whole cauſe: Thirdly, the ſentence tended to eſtabliſh a propoſition of great importance to future caſes; and which had not been before eſtabliſhed by any deciſion in this country; *viz.* that forgiveneſs of adultery may be collected from facts and circumſtances, ſo as to bar the huſband from the right of divorce. That is the Law of the Canoniſts and Civilians: but Lord *Hardwicke* thought, it required more conſideration, before it ſhould be admitted into the Law of *England*. There alſo it was no hardſhip upon the party; for Sir *George Savile* himſelf muſt of neceſſity be at the expence of all the proceedings in the cauſe. Here the party in poſſeſſion of the ſentence muſt be at the expence of the farther litigation: and has no means of being reimburſed;

the petitioner having been permitted to proſecute his appeal as a pauper. He ought to be contented with the ordinary juriſdiction of the country, and not to expect an extraordinary interference, putting the other party under ſuch great diſadvantage. There is no ſurpriſe; no excluſion of evidence, that was not diſcovered in time, or that could not be brought forward, or that was improperly rejected: but the ground is ſimply, that the judgment is wrong upon the merits. In almoſt every caſe there has been the ground of conflicting judgments. This caſe muſt continue doubtful after repeated deciſions upon it. The amount of the property is inaccurately repreſented; for by the inventory delivered on oath it conſiſts of only 4000*l.* 5 *per Cents.* and houſehold furniture and other articles, valued at 7 or 800*l.*

This paper is in ſubſtance and form (except in the deſcription) a complete will; giving directions for his funeral, appointing executors and reſiduary legatees, and ſigned and dated. It is in no degree inofficious; for in caſe of the death of the Miſs *L'Epines* unmarried and without children the property is to go to branches of his own family. For what purpoſe could he have written his name to this paper, if it was a mere memorandum? No other paper than theſe two has ever appeared. The evidence therefore, that ſpeaks of a will, he had made, muſt mean this paper of 1785. The diſtinction, the Courts have always held, is this: if the paper is ſubſcribed, the preſumption is, that it was intended to give it a permanent effect; and no parol evidence can be admitted to ſhew, that intention was abandoned: but if the paper remains incomplete, particularly in point of diſpoſition, the preſumption of abandonment does exiſt; and there parol evidence may be admitted. Though he has called this a plan, he has alſo called it his laſt will and teſtament. The act, he has done, bears every characteriſtic of what he has once called it, his laſt will. It is not future intention. It is preſent, complete, gift throughout; a diſpoſition of all his fortune. If he had occaſionally ſlipped into words of preſent diſpoſition, no great ſtreſs could have been laid on them. But here the words of preſent diſpoſition are uniform. Every ſum given is given by ſuch words. The inſtances, in which he ſpeaks in the ſtyle of memorandum, are, where diſcretionary acts are to be done; as in the direction to ſell the houſehold goods: ſo as to his burial. As to the expreſſion in the Codicil, that he muſt not forget his good

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friends the Miſs *Howells*, he proceeds immediately to give legacies to them; and puts a date and ſignature to it. There are many caſes, in which from the circumſtances, in which the paper has been left, it is impoſſible to ſuppoſe, the party intended, at the time of writing, that it ſhould remain in that ſtate; as where it is written upon a looſe piece of paper, or in a leaf of a pocket-book (*a*); yet if it is teſtamentary, and there is no expreſs declaration, that it is only the baſis of a future will, it ſhall operate; though it is clear from the circumſtances, he intended to make a more formal and complete inſtrument.

This caſe ſhews the propriety of the *Statute*, excluding parol evidence; for here are two ſets of witneſſes ſpeaking directly againſt each other as to the declarations of the teſtator. Such declarations as are relied upon by the petitioner are frequently made by perſons near death, to get rid of importunity, and to give the people about them a good impreſſion of them. But evidence of this ſort is not admiſſible. The ſubſcription may be impeached upon fraud, force, or inſanity: but where thoſe circumſtances do not occur, the ſubſcription cannot be impeached; and the preſumption prevails, that the party ſubſcribed the paper in order to give it legal validity. Where the paper is ſubſcribed by the Deceaſed, a capable perſon, acting freely and voluntarily, the uniform doctrine of the Teſtamentary Courts is, that by ſigning he gives legal validity to the paper; and no evidence of a ſubſequent change of intention can be admitted. I do not deny, that the intention may be ſo ambiguous from the way, in which it is deſcribed, that it may be neceſſary to reſort to evidence, not of intention and deſign, but of what the teſtator himſelf conceived he had done by that paper.

But if this evidence is admitted, it affords no ground for a Commiſſion of Review. It is all one way as to the teſtator's conception, that he had made a will in favor of the Miſs *L'Epines*. There is no trace of any will executed in purſuance of the plan. Mr. *Fox*, the teſtator's attorney, was never conſulted about a will. Theſe declarations therefore muſt be referred to this paper; and ſhew his conception, that by this paper he had made a will. Any evidence may be anſwered by the conjecture, that he might have executed a will in purſuance of this plan. There is no probability, that

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(*a*) *Cox* v. *Baſſet*, *ante*, vol. 3. 155.

that, when he ſpeaks of a will in favor of the Miſs *L'Epines*, he means any thing but this paper. With the uſual inaccuracy of parol evidence Mrs. *Jones* ſpeaks of a legacy of 1000*l.* to Mrs. *Johnſon*; whereas it is an annual payment; and not properly even the intereſt of that ſum. It is only an inaccuracy in her evidence; for ſhe could not have ſeen a will in Doctors' Commons giving the legacy, ſhe deſcribes. What the teſtator ſays as to that legacy in the paper of 1789 is mere miſtake.

Your Lordſhip will not merely upon a doubt of the propriety of the determination recommend a review of the ſentence; which would be big with public inconvenience by encouraging ſuch applications.

Lord Chancellor during the argument obſerved, that he could not conceive, how a man can expreſs a plan of a will without there being in the delineation of it legatory words.

His *Lordſhip* alſo ſaid, applications for a Commiſſion of Review had been made in his time: one before Lord *Northington*: no notice was taken of it; becauſe it was a review of a ſentence in *Ireland*, in the caſe of Lord *Boyne*; and it was ſucceſsful.

The reply was ſtopped by the Court.

Lord Chancellor.—It has been truly ſtated in the argument, that this application is by no means a matter of courſe. It is in the diſcretion of the Crown, upon grounds of ſound diſcretion, to grant a Commiſſion of Review; and though I ſtate it as not being at all a matter of courſe to grant it, I can by no means admit what was ſtated by the *King's Advocate* yeſterday, ſupported by a quotation, that certainly from the reſpect always due to the name of Lord *Camden* deſerves the utmoſt attention. I cannot but ſuppoſe, if the note is accurate, all, that fell from Lord *Camden*, was pointed and applied to the caſe of frequent trials upon queſtions of Prize; upon which undoubtedly very ſtrong arguments occur againſt going beyond the uſual limits, which the courſe of the Admiralty and the obſervance of foreign treaties preſcribe; that from the ſentence of the Vice-Admiralty there may be, and there muſt be, an appeal to the King in Council. It is to be decided there only upon appeal. The deciſion is very ſolemn.

The mode is ſanctioned by public engagements; and the moſt obvious inconvenience ariſes from keeping in ſuſpenſe the queſtion, whether a dividend is to be made among the captors, or the capture is to be reſtored. The poſtponing the deciſion can never happen without great inconvenience, and great public inconvenience; and it is to be conſidered, that the queſtion upon matter of Prize ariſes upon that, which in its own nature is a right of the Crown; though now veſted by the Crown in the captors: but antecedent to the *Act*, that gave the intereſt of the Crown to the captors, the diſpoſition was properly a matter of the King's Prerogative and pleaſure. But as to the ordinary right upon ſuits in the Eccleſiaſtical Court, Lord *Camden* never could have paſſed that ſevere ſtricture upon a Prerogative beyond all doubt veſted in the Crown; for ſo far from its being taken by uſurpation, according to the note, of thoſe rights, that either the Emperors or the Church of *Rome* had arrogated, it could not have eſcaped him, that it is perfectly in analogy to the common law; and that the Law of *England* is particularly anxious, that the right ſhould not be bound by quick concluſions. We all know, that three trials have been frequently granted; and in one inſtance, I think, the caſe of *Lord Faulconberg* v. *Pierce* (*a*) a fourth trial was granted by Lord *Hardwicke*: but three trials in the Courts of Law are frequent.

Three trials frequent; and a fourth has been granted.

The

(*a*) Reported in *Ambler* 210. upon the motion for the third trial.

After three ejectments tried in *Ireland* an iſſue was directed out of Chancery between the ſame parties upon the ſame point. A new trial was afterwards granted upon appeal to the Houſe of Lords; and after that another ejectment was tried.

The celebrated cauſe of Lord *Sherborne* v. *Naper* is a remarkable inſtance of repeated trials. It aroſe in *Ireland* upon a queſtion as to the legitimacy of the *defendant Naper*. Lord *Sherborne* brought an ejectment; which was tried upon the 23d of *November* 1775 at the Bar of the Court of *King's Bench* by a Jury of the county of *Weſtmeath*. The verdict was for the defendant. Upon the 25th of *April* 1780 another ejectment for lands in the county of *Dublin* was tried at the Bar of the Court of *Exchequer*; when the defendant declined calling witneſſes, who had upon the former trial proved a marriage in fact between his parents; and he reſted ſolely on a reputation of marriage. The verdict was for the defendant contrary to the opinion of the Court. Upon the 25th of *November* 1782 another trial took place at the Bar of the Court of *Exchequer*; and the ſame evidence was produced as to the actual marriage as upon the firſt trial: but one of the witneſſes upon the croſs-examination appearing to be perjured, the plaintiff Lord *Sherborne* obtained a verdict. The witneſs died ſoon afterwards: but two perſons were convicted of ſubornation of perjury.

Afterwards an iſſue was directed from the Court of *Chancery* by Lord *Lifford* as to the legitimacy of *Naper*; which was tried upon the 12th of *November* 1788 in the Court of *Exchequer*; when the defendant *Naper* going only upon reputation had another verdict contrary to the opinion of the Court. Lord *Lifford* refuſed an application for another trial: but upon an appeal to the Houſe of Lords from that order it was reverſed on the 16th of *March* 1790; in conſequence of which a fifth trial was ordered; which took place at the Bar of the Court of *Common Pleas*; and the verdict was again for the defendant *Naper*. That verdict ſtanding unimpeached, an application for a new trial was refuſed by Lord *Clare* on the 16th of *December* 1790.

Lord

The queſtion is decided by a Judge and Jury in the firſt inſtance, and then a ſecond and a third time.

But take the courſe of the Law in matters of Error. There is no queſtion of civil right, that in the ordinary courſe of the juriſdiction of this Country may not go through three inquiries. A cauſe beginning in the Court of Common Pleas goes firſt to the Court of King's Bench, and from that to the Houſe of Lords. In the courſe of the Court of King's Bench the writ of error antiently was at once to the Houſe of Lords. That was found to be extremely inconvenient; the Houſe of Lords not ſitting at that time ſo regularly and conſtantly, as they do now; and in order to remedy that inconvenience, and following up the principle of ſucceſſive inquiries, whether error, or not, the Court of Exchequer-chamber was eſtabliſhed by the *Statute* of *Elizabeth.* From that it goes to the Houſe of Lords. In that way there are alſo three inquiries.

There is no queſtion of civil right, that in the ordinary courſe of the juriſdiction of this country may not go through three inquiries.

There is only one caſe, in which for an obvious reaſon the common law makes a repeated inquiry not a matter of right but of diſcretion. That is, in criminal caſes. If it was at the diſcretion of the party, he would always take that mode of delaying execution. Therefore it is in the diſcretion of the Crown to grant it, or not. An application is to be made to the Officer of the Crown, the Attorney General. It was held at one time, and it was extravagant enough, that a Writ of Error in civil matters is not a matter of right. I allude to the caſe of the *Ayleſbury* men. In the heat of party the Houſe of Commons adopted that unwiſe and indiſcreet opinion: but the Lords reſolved to the contrary; and that the Crown is bound to iſſue the Writ in civil caſes: in criminal caſes the Officer of the Crown muſt interfere to prevent a Writ of Error being ſued out merely to evade execution of the judgment: but if diſtinct matter of error can be pointed out, in my obſervation and practice the Attorney General has not thought himſelf at liberty to refuſe it: if there is an appearance of right, if it is an arguable caſe, he does not prevent it, but permits it to be argued.

In criminal caſes a repeated inquiry is not matter of right, but of diſcretion; and can only be had with the conſent of the Attorney General.

21

This I conceive to be a mis-construction.

Lord *Sherbornt* afterwards brought another ejectment for lands in the county of *Weſtmeath*; which was tried in the Court of *King's Bench*; and another verdict was given for the defendant *Naper*. A Bill of Exceptions was tendered upon ſome evidence; which was never made up.

See *Ridgeway's Caſes in Parliament, in Ireland*, vol. 2. 224.

It is not merely perhaps an opinion, that the judgment is erroneous, that would induce me to report, that the Commiſſion ought to iſſue, where a grave inquiry has been carried on, and a very reſpectable Court of Delegates have affirmed the ſentence; though I muſt doubt it. I agree, there ought to be circumſtances to make the queſtion of ſome importance. Here the value may be more or leſs. Upon one ſide it is ſtated as high as 20000*l.* on the other ſide it is repreſented as not exceeding 5000*l.* But the point to be argued is really a very material one; and the circumſtance, that biaſſes my judgment, is this: I cannot take upon me to ſay, whether according to the courſe in the Court of Probate there are not authorities, that would very abundantly ſupport the deciſion: but if ſo, I wiſh to have that point fully aſcertained by a ſecond inquiry directed to that preciſe point; becauſe, if ſuch a thing as this is to be proved as a will, it calls loudly upon the Legiſlature to make ſome regulation as to the diſpoſition of perſonal property, ſo as that there ſhould be ſomething of ſolemnity, certainty and preciſion, in order to give away that property, and defeat the natural rights of the relations. There is only one way, in which I can form my own judgment upon it. Part of the evidence I lay perfectly aſide. As in every caſe of parol evidence of the intention, as to what the teſtator may have declared, the evidence is in perfect contradiction: One ſet of witneſſes ſpeaking to poſitive declarations, that he had made a will; others as poſitively to declarations, that he never had; and would not ſettle his affairs. It is always ſo: whether the evidence is to rebut a reſulting truſt, or to explain a will, one never fails to ſee, that the witneſs comes with the party. Beſides that, there is the particular mode of applying the converſations. In a very late inſtance before me, the caſe of *Nourſe* v. *Finch*, (*ante* vol. 1. 344. vol. 2. 78.) the parol evidence was all the converſations, the witneſſes held to the teſtator, and taking him to have aſſented to the propoſitions, they ſtated to him.

Another part of the evidence here conſiſts of facts and circumſtances; the exiſtence of which very much affects the queſtion, whether there is a will, or not. Suppoſe, I was trying it in a Court of Law upon an iſſue *Deviſavit, vel non*, upon the view of the paper, and the evidence, how it was diſcovered, among Office papers, in an Office deſk of a ſtorekeeper; with the additional circumſtance, that another paper in his hand-writing was found in his houſe among his private papers; with the circumſtance of his declaration in that ſecond paper, which, though it could not be ſet up as a will, becauſe it is quite unfiniſhed, yet is a declaration as to the legacy, he intended for Mrs. *Johnſon*, and directly ſupports the evidence of Mrs. *Jones*, that he had by a will given a legacy to Mrs. *Johnſon* of 1000*l.* 5 *per Cents.* He has ſaid directly in that paper, that he intended to give her 1000*l.* 5 *per Cents.* The comment upon it is, that he was miſtaken; that he muſt have been referring to the gift made in the prior paper, not of 1000*l.* nor of the intereſt of it, but of an annuity of 60*l.* a year, charged upon the intereſt of a ſum of money in the 5 *per Cents.* It is too much for me, it would be very raſh, to conclude, that he was miſtaken in that. He has ſaid, he intended to give her 1000*l.* 5 *per Cents.* He carries it on in a will, that cannot take effect as a will, but is a declaration under his hand. Then add the circumſtance of what he calls it. There is nothing but the mere circumſtance, that this, which he profeſſes to be a plan of a will propoſed to be drawn out, contains legatory words of preſent gift. He entitles it "A Plan deſigned for the laſt will "and teſtament of *William Matthews* Storekeeper of His Majeſty's "Yard, *Deptford*." In his codicil he ſays, "I muſt not forget "my good friends Miſs *Mary* and Miſs *Charlotte Howell*," &c. If that had been "*Memorandum* to give" it would ſpeak ſtrongly with the firſt ſentence and the title. It is running very near to ſay, there is any diſtinction between "*Memorandum*" and "I muſt "not forget."

Under all theſe circumſtances, with this evidence, and, above all, the evidence of the paper itſelf, I ſhould have no difficulty, ſitting, as I have ſat, in a Court of Law, to put it ſo to the jury, that I ſhould expect a verdict, that he had not deviſed; that it was no will, but only a project of a will, not a complete, definite rule and law for ſettling his fortune. It is not, it cannot, be denied, the argument preſſes ſo ſtrong, that upon the peruſal of this paper the natural concluſion is, that it was his intention to make a more formal paper than this. That inference cannot poſſibly be avoided. Then *ex hypotheſi* this paper at the time he ſubſcribed it was not *the* law, *the* teſtament. When then, at what period, did the *voluntas teſtandi* exiſt in his mind *quoad* this inſtru-

MATTHEWS *v.* WARNER.

Voluntas teſtatoris ambulatoria eſt uſque ad mortem.

ment? If it is admitted, as it muſt be, that when he ſubſcribed his name, he was looking to ſome future act, the deciſion, that this is his will, would deſtroy the moſt general maxim, I know of, "*voluntas teſtatoris ambulatoria eſt uſque ad mortem.*" No man can anſwer the queſtion, at what time that intention exiſted in his mind. I know, there was a period, when a contrary intention exiſted. He has given that evidence under his own hand by the paper of 1789.

Under all theſe circumſtances I ſhould have felt myſelf obliged, as an act of duty, ſtrongly to preſs upon the conſideration of the jury the utter impoſſibility upon the fair reſult of the evidence of making the ſuppoſition, that this was the will, and I muſt have added another circumſtance, that it was his laſt will. The manner in which it was kept, with ſo little attention, the place, where it was found, theſe circumſtances are always of great conſideration.

But though that is the bias of my mind, I am very far from ſaying, it may not be a neceſſary concluſion in the Court, which is to decide by other maxims than we are acquainted with here, that this will may be eſtabliſhed: but I wiſh the point, after it has been well canvaſſed and conſidered, to be felt as a point of great weight and importance; and if ſuch things are to be eſtabliſhed as wills, it loudly requires the interference of the Legiſlature to prevent ſuch a latitude in that reſpect, as makes the diſpoſing of all a man's fortune the moſt ſlight and trivial act, attended with much leſs of form, ſolemnity, and preciſion, than any act, he could do with regard to any part of his property during his life.

I ſhall therefore certify, that it is proper, that this Commiſſion ſhould be granted.

In the certificate to His Majeſty, that followed this judgment, the Lord Chancellor, as the ground of his opinion, that it is reaſonable and proper for His Majeſty to grant a Commiſſion of Review in this cauſe, ſtates, that the points of law, which ariſe on the proceedings, appear to his Lordſhip to be ſo important to the Public, that it is fit, that they ſhould be heard and determined in the moſt ſolemn manner.

A Commiſſion of Review iſſued accordingly (*a*). Note, that under this Commission of Review, the case was heard at Serjeants Inn Chancery Lane 20. Nov.r 1799. & that after hearing counsel for a short time the Lord Commissioners decided that the [illegible] was admissible to explain whether the [illegible] question was [illegible] or not, & was sufficient to [illegible] proved, it's not being so: & upon this ground [illegible] had [illegible] Judgment the sentence of the Prerogative Court & of the Delegates [illegible] reversed

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Commiſſion of Review in Ireland upon a ſentence of the Court of Delegates affirming a ſentence of the Prerogative Court.

(*a*) A late inſtance of a ſucceſsful application for a Commiſſion of Review has occurred in *Ireland* in the caſe of *Goodwin* v. *Gieſler*; publiſhed in *The Iriſh Term Reports*, from *Eaſter* Term 34 *Geo.* 3. to *Hilary* Term 35 *Geo.* 3. incluſive. The ground of the application was, that the Court of Delegates affirmed the ſentence of the Prerogative Court in the abſence of the Appellant's Advocates and Proctor; who upon the refuſal of an application on the part of the Appellant for an adjournment, in order to examine the proceedings, left the Court.

The Petition was preferred to the King in Council, and in the uſual courſe was referred to the Lord Chancellor. Lord *Clare* in delivering his opinion obſerved, that where a ſentence of the Eccleſiaſtical Court has been ſolemnly affirmed by the Judges Delegates, and a Petition is preferred to the Crown for a Commiſſion of Review, the caſe ought to receive a very ſerious and deliberate conſideration to warrant a Report to His Majeſty, that ſuch a Commiſſion ought to iſſue. In ſuch a caſe he ſhould never hold himſelf authorized, merely becauſe he might differ in opinion with the Judges Delegates upon the proofs in the cauſe, humbly to adviſe His Majeſty to interpoſe.

His Lordſhip then goes into the caſe; and ſays, that the ſentence of affirmance muſt bind the parties finally and irrevocably, unleſs His Majeſty ſhall interpoſe, and appoint Commiſſioners of Review to do that juſtice, which ought to have been executed under the ordinary Commiſſion of Appeal. That ſuch a power reſts with the Crown no man can doubt; and if ever a caſe exiſted calling loudly for the exerciſe of it, it was that, upon which he was then to report.

His Lordſhip added, it was a duty, he owed to His Majeſty, faithfully to ſtate the proceedings, that had taken place, and humbly to ſubmit, that there will be a failure of juſtice, unleſs His Majeſty ſhall be graciouſly pleaſed to interpoſe his authority by directing, that a Commiſſion of Review ſhall iſſue to rehear and review the ſentence, and the proceeding, of which the Petitioner has complained.

In *Pentland* v. *O'Maley*, a teſtamentary cauſe in *Ireland* before the Court of Delegates in 1782 or 1783, the Delegates were equally divided: Mr. Juſtice *Helen* and Mr. *Veſey* againſt Mr. Juſtice *Crookſhank* and Mr. *Burroughs*; and no judgment was given. Lord *Lifford* ſaid, he could do nothing in it; but that in future he would take care, that there ſhould be a majority. It was afterwards compromiſed.

Though by the *Statutes* 24 *Hen.* 8. *c.* 12. and 25 *Hen.* 8. *c.* 19. it is declared, that the ſentence of the Court of Delegates ſhall be definitive, this branch of the Prerogative was confirmed at the Reformation, as one of the powers antecedently exerciſed by the Pope; whoſe authority was annexed to the Crown by the *Statutes* 26 *Hen.* 8. *c.* 1. and 1 *Eliz.* *c.* 1. See alſo 4 *Inſt.* 341. *Dyer* 273. *Cro. Eliz.* 571.

It may be uſeful by way of direction as to the practice upon this very rare proceeding to add, that the Petition is addreſſed, not to the King in Chancery, but to the King's Moſt Excellent Majeſty in Council. It ſtates briefly a naked caſe of facts, and the ſentence of the Court of Delegates; and that by ſuch ſentence the Petitioner thinks himſelf aggrieved. It then proceeds to pray, that His Majeſty would moſt graciouſly be pleaſed to grant a Commiſſion of Review to rehear, reconſider, and determine, the ſaid Cauſe, directed to ſuch Lords Spiritual and Temporal, and Judges of the Common Law, and Doctors of the Civil Law, of this Realm as to His Majeſty in his great wiſdom ſhall ſeem meet, with the uſual clauſe of *Quorum*, &c. 3

HARRISON *v.* ROWLEY.

Rolls, June 29th, Nov. 8th.

An executor, who died before probate, was held entitled to a legacy given for his care and loſs of time in the execution of the truſts of the will by having concurred with the other executors in directions for the funeral and in paying ſome ſmall ſums on that occaſion.

MARY *Alſager*, by her will, dated the 20th of *June* 1792 deviſed divers real eſtates, and gave the principal part of her perſonal eſtate, to her executors and truſtees upon the truſts expreſſed in her will, for the benefit of her ſiſter *Judith Alſager*; and in caſe ſhe ſhould not diſpoſe thereof, the teſtatrix made a general diſpoſition in favour of other relations.

She gave and bequeathed to her ſaid executors and truſtees the ſum of 100 *l.* each for their care and loſs of time in the execution of the truſts repoſed in them, together with all reaſonable expences, when they ſhould be called from home on account thereof: and ſhe appointed *John Ford*, *Thomas Rowley*, and *Jonathan Wilſon*, joint executors of her ſaid will and truſtees for the ſeveral purpoſes therein mentioned.

Judith Alſager, ſiſter of *Mary Alſager*, made her will, bearing the ſame date, by which after deviſing divers real eſtates and giving the principal part of her perſonal eſtate to her executors and truſtees upon ſimilar truſts for the benefit of her ſiſter *Mary Alſager*, with a diſpoſition, in caſe ſhe ſhould not diſpoſe thereof, in favour of the ſame perſons as expreſſed in the will of her ſaid ſiſter, ſhe gave to her ſaid executors and truſtees legacies of 100*l.* each, together with their reaſonable expences, exactly according to the will of her ſiſter; and ſhe appointed the ſame three perſons executors and truſtees.

Judith Alſager died on the 21ſt of *February*, 1795; and was buried on the 27th of the ſame month.

An order then iſſues from the Council to the Lord Chancellor, to inquire into the merits of the Petition and report his opinion to His Majeſty.

In conſequence of that order the Lord Chancellor hears the parties by Counſel, including Civilians, and makes his Report to His Majeſty, whether it will be reaſonable and proper for His Majeſty to grant a Commiſſion of Review according to the Prayer of the Petition. If the Report is in favour of the Petition, an order iſſues from the King in Council directing the Lord Chancellor to cauſe ſuch Commiſſion to be prepared in the uſual manner under the Great Seal. The Commiſſion is directed to new Delegates, including Lords Spiritual and Temporal, Judges of the Common Law, and Doctors of the Civil Law; and in order to make a final decree or ſentence one at leaſt of each claſs is directed by the Commiſſion to attend.

Mary Alſager died on the 23d of *March* 1795; and was buried on the 27th of the ſame month. She made no farther diſpoſition of her property.

John Ford, the executor, died on the 16th of *April* 1795.

The wills of *Judith* and *Mary Alſager* were proved on the 27th of *June* 1795, by the ſurviving executors.

The bill was filed by the executors of *John Ford* againſt the ſurviving executors of *Mary* and *Judith Alſager*, claiming the ſaid legacies of 100*l.* each.

The Defendants by their anſwer ſtated, that they did not know, that *John Ford* acted in the truſts of the ſaid wills of the ſaid *Mary Alſager* and *Judith Alſager* further or otherwiſe than that the Defendants went to his houſe, he being unwell, and there ſettled the orders given reſpecting the funeral of the teſtatrix *Mary Alſager*. They farther ſtated, that the reſiduary legatees of *Mary* and *Judith Alſager* diſputed the right of the Plaintiffs to the ſaid legacies on the ground of *John Ford* not having taken probate of the wills of the ſaid teſtatrixes, or entitled himſelf to the ſaid legacies.

In ſupport of the bill *Thomas Heron Ravenſcroft* depoſed, that *John Ford* did act in the truſts of the ſaid wills of *Mary* and *Judith Alſager*, particularly in directing the Deponent to pay on the 1ſt of *April* 1795, the ſum of 1*l.* 14*s.* 4*d.*, being the fees on the burial of *Mary Alſager* and *Judith Alſager*, and alſo on the ſame day to pay 4*l.* 6*s.* for making their coffins, and alſo on the ſame day to pay 1*l.* 19*s.* for opening the vault of the ſaid *Mary* and *Judith Alſager*, and cloſing the ſame again; and the Deponent paid the ſaid ſeveral ſums in purſuance of the ſaid directions received by him from *John Ford*.

The receipts for theſe ſums, dated the 1ſt of *April* 1795, were produced in evidence; and they expreſſed, that the ſaid ſums were received from *John Ford*, Eſq. one of the executors and truſtees of the late Mrs. *Alſagers*.

When the cauſe firſt came on, the Master of the Rolls directed it to ſtand over, in order to have the dates aſcertained.

Mr. Graham and Mr. Pemberton for the plaintiffs.—It is certainly true, that where a legacy is given to a truſtee expreſsly for care and pains, if he totally omits executing the truſt, he is not entitled to the legacy: *Humberſton* v. *Humberſton*, 1 *P. Will.* 333. but a very ſmall matter is ſufficient. This perſon clearly accepted the truſt; and made himſelf liable as *executor de ſon tort.* The only reaſon for refuſing a legacy of this ſort is, where the executor by his own lacheſs has not entitled himſelf. Here appears a diſpoſition to do every thing, that was required of him. The Defendants did not prove theſe wills till above two months after the death of their co-executor. Where is the line to be drawn, as to what acts will be ſufficient to entitle an executor to his legacy? The Defendants admit, they went to the houſe of *Ford*, he being unwell, and there ſettled the orders as to the funeral of *Mary Alſager*, the ſurvivor of the teſtatrixes.

Mr. Lloyd and Mr. Hall for the Defendants.—Theſe legacies are not given to the executors out of favor, but merely in conſideration of their care and trouble in the execution of the truſts. If this executor had died the next day, it would have been impoſſible to contend, that he could be entitled. Some ſubſtantial act is neceſſary to ſhew, he meant to act, and did take ſteps for that purpoſe. He ſhould have done ſomething by way of taking poſſeſſion of the eſtate, or ſome act as executor. That perhaps would have done, though probate was not taken out. Will any ſingle act do: as on the night of the death ordering the bell to be tolled? Will an order given to another perſon by the executor to pay a ſingle ſum of money entitle him to a legacy given to him for his care and loſs of time? Perhaps from its being given him in the character of executor it may be neceſſary, that he ſhould have proved the will. It has been frequently ſaid, that an executor cannot be entitled to a legacy without proving the will. That probably may be relaxed; and ſome acts may be conſidered equivalent to probate: but without ſome act of dealing under the will or probate he cannot be entitled. Paying for the funeral is an equivocal act. It is an act of charity, independent of the duty of an executor. It is not ſuch an act as would compel him to adminiſter the effects. An intention on the part of the executor would not do, unleſs he manifeſted it ſo as to make himſelf liable to be compelled to act: *Read* v. *Devaynes*, 3 *Bro. C. C.* 95. In *Abbot* v. *Maſſie*, (*ante* vol. 3. 149.) the

Lord Chancellor holding, that an executor, who refuſed to act, could not take a legacy given to him as executor, gives the reaſon expreſsly, becauſe he did not prove the will. In 4 *Burn's Ec. Law* 198. 5th edit. there is a great deal of learning upon this ſubject; and the acts of charity are ſtated, that would not make a man compellable to act: as burying the deceaſed, taking care of his goods for ſafe cuſtody, *&c.*

Mr. Graham in reply.—Suppoſe, he had acted for two years, but there had been ſome diſpute about the probate, and they had gone to the Delegates, before they could obtain it: it would have related. All the legal rights veſt by the death of the party. Theſe perſons having died in opulence, he could not mean to bury them as an act of charity. He does it in conſultation with the other executors. In the two caſes cited the executor manifeſted an intention not to act. This executor has ſhewn an intention to act: but he was prevented by the act of God. It is impoſſible to draw a line. Where the executor has ſhewn a fair, unequivocal intention to go as far as he can, and is not prevented by his own fault or neglect, there is nothing to deprive him of his legacy. The principle is, that there muſt be poſitive evidence of his declining to act in the truſt.

Maſter of the Rolls.—Any farther inquiry would lead to an expence more than the amount of the legacies.

The only queſtion is, whether this executor has demonſtrably ſhewn his intention to act in the execution of the truſt, for which he with two other perſons was to receive theſe legacies. It is moſt clear, they were not given to him as a mark of perſonal regard merely, but as a reward for taking upon him the execution of the truſts. Firſt, is there any evidence, that he underſtood and knew, he had ſuch a truſt impoſed upon him, and the terms, upon which it was to be taken? I will not determine, that if he had died at a diſtance without knowing, that he was appointed executor, or manifeſting any intention to take upon him the truſt, as if he had died at a diſtance, before the information reached him, he would be entitled. I will not decide that one way or other. But that is not the caſe here. This executor certainly did not die without knowing of this truſt: on the contrary the two other executors, the defendants, went to him, and conſulted with him reſpecting the

Qu. Whether an executor was entitled to a legacy in that character, who died at a diſtance without manifeſting any intention to accept the truſt, or without knowing of it.

the funeral of the ſurvivor of theſe two ladies at leaſt; (it does not appear by whoſe directions the other was buried;) and he concurred in giving the directions. Is not that an act notifying his intention to accept the truſt? I muſt ſuppoſe, they informed him of the will, the truſt impoſed upon them, and the reward. With this knowledge he concurred in thoſe directions. It is true, I admit, that if there was no executor, giving directions for the funeral is only an act of charity, and will not make a man executor. God forbid, it ſhould; for then the deceaſed could not be buried by any one from the apprehenſion of being involved as executor. But this perſon did not concur in the directions for the funeral as an act of charity. There were two other executors. The deceaſed would have been buried, whether he concurred, or not. He alſo concurred in paying certain ſums for the burial fees, for making the coffins, and opening the vault, the conſequences of thoſe directions.

Giving directions for the funeral will not make a man executor.

Then, is there any lacheſs in not proving the will? As to the two caſes cited, nothing is ſo clear, as that if a legacy is given to man as executor, whether expreſſed to be for care and pains, or not, he muſt, in order to entitle himſelf to the legacy, clothe himſelf with the character of executor. If there is any circumſtance to ſhew, he was backward in undertaking the truſt repoſed in him, he ſhall not have it. But this executor did as much as the defendants; for they did not prove the will for a conſiderable time. He did as much as any man could do in ſhewing demonſtrably; he meant to undertake the truſt. His dying before he executed it cannot poſſibly defeat him. Therefore upon the evidence, and the rules, that have been laid down, I am of opinion, he has acted as far as he could, and was entitled.

Declare the plaintiffs entitled to the legacies of 100*l.* and 100*l.* given to *John Ford* by theſe wills; and let them be paid with coſts out of the aſſets.

1798.
Nov. 23d and 27th.

ALSAGER *v.* JOHNSON.

A ſchedule to an anſwer containing at length a bill of coſts and obſervations with reference to a bill formerly delivered for the ſame buſineſs held impertinent, though the bill called upon the defendant to ſet forth, how he computes and makes out his demand with all the particulars relating thereto, with interrogatories pointed to the particular *Items* and to a minute compariſon of the two bills.

Judith Alsager and *Mary Alſager*, upon whoſe wills the preceding caſe aroſe, had for ſeveral years before their death employed *John Johnſon*, an attorney at *Congleton* in *Cheſhire*, as their agent to collect their rents and manage their eſtates, and as their attorney and ſolicitor. After the death of *Mary Alſager*, who ſurvived her ſiſter *Judith*, *Johnſon* in 1796 delivered to their executors and truſtees a bill of coſts amounting to about the ſum of 1000*l.*; and in *April* 1797 he delivered to them another bill of coſts, amounting to the ſum of 1425*l.* 19*s.*, purporting to be a more correct bill, for buſineſs done during the ſame period. He afterwards brought an action in the Court of *Common Pleas* againſt the executors for the recovery of the amount of the bill laſt delivered. The reſiduary deviſees and legatees applied to the executors to be permitted to defend the action; which was refuſed. Upon the trial of that action on the 20th of *July* 1797 it was ordered by conſent of the parties, that there ſhould be a verdict for the plaintiff for 1400*l.* damages and 40*s.* coſts, ſubject to the award of the Prothonotary of the Court; to whom all matters in difference between the parties were thereby referred; which order was afterwards made a Rule of Court. The arbitrator by his award found, that there was due from the defendants in the action as executors and truſtees, as aforeſaid, to the plaintiff the ſum of 1175*l.* 9*s.* 8½*d.*; and he directed the coſts of the reference to be taxed, and to be paid by the defendants.

The bill was filed by the reſiduary deviſees and legatees of *Judith Alſager* and *Mary Alſager* againſt their executors and truſtees *Thomas Rowley*, *Jonathan Wilſon*, and *James Twemlow*, and againſt *John Johnſon*; impeaching the demand of *Johnſon*; charging colluſion between the defendants; and praying a diſcovery; and that the defendants, the executors, may be reſtrained by Injunction from paying, and *Johnſon* from receiving, the money awarded to him.

With a view to impeach the demand of the defendant *Johnſon* the Bill contained the following among many other Interrogatories, founded upon a charge, that the defendant *Johnſon* had formed a deſign to get back ſome part of a ſum of money, which being due by him to *Judith* and *Mary Alſager* upon mortgage and a promiſory note was paid by him upon being called on by the executors:

Whether the ſaid defendant did not in order to carry ſuch ſcheme or deſign into execution, or for what other reaſon, and with what view or deſign, and when in particular, make out and deliver or cauſe to be delivered to the ſaid *Thomas Rowley*, *Jonathan Wilſon*, and *James Twemlow*, or ſome or one and which of them, a bill of coſts amounting in the whole to 1000*l.*, or what other ſum of money for ſome law or other buſineſs pretended to have been done, tranſacted, and performed, by him for ſaid *Judith* and *Mary Alſager*, or one and which of them reſpectively, between 1787 and 1795; or between or during any other and what times or time; and whether all ſuch buſineſs was really and actually done and performed by him for them, or either and which of them reſpectively, and at what times in particular; and whether ſaid *John Johnſon* did not ſome time afterwards, and when, and why, and for what reaſon, make out and deliver or cauſe to be delivered to ſaid *Thomas Rowley*, *Jonathan Wilſon* and *James Twemlow*, or ſome or one and which of them, another bill of coſts, amounting in the whole to 1400*l.*, or to what other ſum of money, for the ſame pretended buſineſs, or for any other and what buſineſs in particular:

And whether any and what ſum in particular was juſtly due or owing to ſaid *John Johnſon* from ſaid *Judith* and *Mary Alſager*, or either and which of them, at the death of ſaid *Mary Alſager*, upon any and what account in particular; and if they, the ſaid *Thomas Rowley*, *Jonathan Wilſon*, *James Twemlow*, and *John Johnſon*, or any of them, ſhall pretend, that there was any ſuch, then that they may ſeverally ſet forth and diſcover, how and in what manner they compute and make out the ſame with all the particulars relating thereto:

And whether the ſaid *John Johnſon* has not in each or one and which of the ſaid laſt-mentioned bills of coſts, and why, or for what reaſon, and with what view or deſign in particular, in ſome and what inſtances or inſtance charged twice for one and the ſame matter and thing; and whether he has not done the ſame by charging each of them the ſaid *Judith Alſager* and *Mary Alſager* ſeparately therewith, or how otherwiſe; and whether the ſeveral *Items* contained in the ſaid bill of coſts laſt made out and delivered by the ſaid *John Johnſon*, as aforeſaid, or ſome and which of them, are not ſimilar or nearly ſimilar in words to the ſeveral or to ſome of the ſeveral *Items* contained in the ſaid bill of coſts firſt made out and delivered by him, as aforeſaid, or how otherwiſe; and whether ſome and which of the charges ſet againſt ſome and which of the *Items* contained in the ſaid bill of coſts laſt made out and delivered by the ſaid *John Johnſon*, as aforeſaid, are not to a greater and how much greater amount than the charges ſet againſt the ſame kind of *Items* contained in the ſaid bill of coſts firſt made out and delivered by him, as aforeſaid; and whether the ſaid *John Johnſon* did not by the means aforeſaid or by ſome other and what means make the ſaid bill of coſts laſt made out and delivered by him, as aforeſaid, amount in the whole to the ſum of 400*l.* or to what other ſum of money more than he had made the ſaid bill of coſts firſt made out and delivered by him, as aforeſaid, amount unto in the whole:

And whether the ſaid two laſt-mentioned bills of coſts or one and which of them are or is not now, or were or was not lately, or ſome time ago, and when laſt, in the cuſtody or power of the ſaid *Thomas Rowley*, *Jonathan Wilſon*, and *James Twemlow*, or of ſome or one and which of them, or what are become thereof reſpectively; and that the ſaid *Thomas Rowley*, *Jonathan Wilſon*, and *James Twemlow*, or ſuch of them as now have or has the ſaid laſt-mentioned bills of coſts in their or his cuſtody or power may produce and leave the ſame in the hands of their or his Clerk in Court in this cauſe for the uſual purpoſes:

And that the ſaid *John Johnſon* may alſo ſet forth, whether any and what ſum of money was juſtly due and owing to him from the ſaid *Judith Alſager* and *Mary Alſager* or either and which of them upon any and what account in particular at the time he the ſaid *John Johnſon* ſigned and gave ſuch promiſſory note to the ſaid *Mary Alſager*, as aforeſaid; and if the ſaid *John Johnſon* ſhall pretend, that there was any ſuch, then that he may ſet forth, how and in what manner he computes and makes out the ſame with all the particulars relating thereto:

Whether the ſaid *Judith Alſager* and *Mary Alſager* or one and which of them did not always from time to time pay to or allow in

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in account with the ſaid *John Johnſon* all and every the ſums and ſum of money, which became due and owing to him from them or either of them for all and every the buſineſs, which was done and performed by him for them or either of them, when and as or ſoon after he made out and delivered the bills of coſts for ſuch buſineſs to them or either of them, or at ſome other and what times or time; and whether the ſaid *John Johnſon* did not upon all or ſome and which of ſuch occaſions or upon ſome other and what occaſion ſign and give to the ſaid *Judith Alſager* and *Mary Alſager* or one and which of them ſome and what receipts for the amount of the ſame bills of coſts and which of them reſpectively; and if the ſaid *John Johnſon* ſhall pretend, that the ſaid *Judith Alſager* and *Mary Alſager* or either of them did not pay to or allow in account with him all and every ſuch ſum and ſums of money, as laſt mentioned, then that he may ſet forth, which of ſuch ſums or ſum of money were or was not ſo paid or allowed, and why and for what reaſon the ſame were or was not paid or allowed; and that all the ſaid defendants may alſo anſwer and ſet forth, whether the ſaid *Thomas Rowley*, *Jonathan Wilſon*, and *James Twemlow*, or ſome or one and which of them, did not after the deceaſe of the ſaid *Mary Alſager* and when and why and for what reaſon and upon what occaſion in particular employ the ſaid *John Johnſon* in or about ſome of the affairs relating to the eſtates and effects of the ſaid *Judith Alſager* and *Mary Alſager* or one and which of them reſpectively; and whether the ſaid *John Johnſon* did not upon thoſe occaſions or ſome or one and which of them or upon ſome other and what occaſions or occaſion and when in particular get into his cuſtody or power ſome and what books of account, deeds, papers, and writings, or ſome or one and which of thoſe particulars, relating to ſuch eſtates and affairs or ſome or one and which of them, and particularly all or ſome or one and which of the ſaid laſt-mentioned bills of coſts, and the receipts ſigned and given by him for the amount thereof or of ſome or one and which of them reſpectively; and whether all or ſome or one and which of ſuch books of account, deeds, papers, and writings, and particularly ſuch laſt mentioned bills and receipts or ſome or one and which of them are or is not now, or were or was not lately, and when laſt, in the cuſtody or power of the ſaid defendants or ſome or one and which of them, or what are become thereof reſpectively; and that the ſaid defendants, or ſuch of them as now have or has the ſaid books of account, deeds, papers, and writings, and particularly the ſaid laſt mentioned bills of coſts and receipts, in their or his cuſtody or power, may produce and leave the ſame and each and every of them in the hands of their or his Clerk in Court in this cauſe for the uſual purpoſes; and that the ſaid *John Johnſon* may alſo ſet forth, whether he has not or had not lately, and when laſt, in his cuſtody or power ſome other and what books of account, papers, and writings, and alſo ſome and what letters, entries, minutes and memorandums, relating to the ſeveral matters aforeſaid, or ſome or one and which of them, and particularly to the buſineſs done and performed by him for the ſaid *Judith Alſager* and *Mary Alſager*, or one and which of them reſpectively; and that the ſaid *John Johnſon* may produce and leave all and every ſuch other books of account, papers, writings, letters, entries, minutes, and memorandums, in the hands of his Clerk in Court in this cauſe for the uſual purpoſes; and that all the ſaid defendants may alſo anſwer and ſet forth, whether all or ſome and which of the ſeveral *Items* contained in the ſaid bills of coſts made out and delivered by the ſaid *John Johnſon* to the ſaid *Thomas Rowley*, *Jonathan Wilſon*, and *James Twemlow*, as aforeſaid, are not actually contained in the ſaid bills of coſts ſo made out and delivered by him to the ſaid *Judith Alſager* and *Mary Alſager*, and for the amount whereof reſpectively the ſaid *John Johnſon* ſigned and gave ſuch receipts, as aforeſaid, or in ſome or one and which of them.

The defendant *Johnſon* by his anſwer, as far as it related to the ſubject of theſe interrogatories, denied having formed any ſuch deſign as the bill imputed to him; and in order to account for the variation between the two bills of coſts he ſtated, that the bill firſt delivered being made out in haſte under an expectation of immediate payment, and the buſineſs, to which it related, being of a multifarious nature, and part of it performed long ago, the defendant by the advice of his town agent reviſed it, and found, he had in ſome inſtances omitted charges, and in many others charged leſs than he was legally entitled to; and defendant for the ſatiſfaction of ſaid plaintiffs, and as required by their ſaid bill of complaint hath in the ſchedule to his anſwer ſet forth, how and in what manner he computes and makes out the ſum of 1175*l.* 9*s.* 8½*d.* ſo due and owing to him from the ſaid *Judith Alſager* and *Mary Alſager*, as aforeſaid, with all the particulars relating thereto.

As to the repeated charges for the ſame buſineſs, the defendant ſtated, that it was the cuſtom of *Judith* and *Mary Alſager* to be attended and adviſed with by the defendant ſeparately on the ſame ſubject; and he did in thoſe inſtances only and no others charge in the bill of coſts laſt delivered, but not, as he believes, in the bill firſt delivered, twice for the ſame thing by charging *Judith* and *Mary Alſager* ſeparately. He ſtated, that he was unable to ſet forth, whether the ſaid bills were in the hands of the other defendants, or what was become of them. He denied, that he had any books, papers, *&c*, relating to the matters in the bill, except his own books of account, papers, and writings, relative to his profeſſional buſineſs: but he admits, he has divers letters, entries, minutes, accounts and memorandums, relating to ſaid matters, and particularly to buſineſs done for *Judith* and *Mary Alſager*, and alſo his ſaid books of account, *&c*; but he is unable to ſet forth, what ſuch letters, *&c*, books, *&c*, are, without having recourſe thereto, and none of which are now in his cuſtody except the rough draft of the firſt bill of coſts and copy of the ſecond bill (from which the ſchedule to his anſwer was made out), the ſame or the greater part thereof being, as he believes at his office in *Congleton*; and which are neceſſary to be there for the purpoſe of conducting his buſineſs; and therefore he cannot produce and leave them with his Clerk in Court without manifeſt inconvenience to his profeſſional buſineſs. He denied, that any of the *Items* in the ſaid two bills of coſts were contained in the bills delivered to *Judith* and *Mary Alſager*, and for the amount of which he had given receipts; and he denied all colluſion.

The defendant *Johnſon* by way of ſchedule to his anſwer ſet forth at length his bill of coſts with obſervations in the following manner:

Bill of coſts laſt made out and for the recovery of which the action was brought.			
Attending Mrs. *Mary Alſager*, *&c.*	13*s.* 4*d.*	For this *Item* only 6*s.* 8*d.* was charged in the firſt bill.	Difference 6*s.* 8*d.*

The ſchedule running to great length, the Plaintiffs obtained an order referring it to the Maſter to ſee, whether the anſwer was impertinent. The Maſter by his Report certified, that he was of opinion, the anſwer was impertinent from *folio* 194 to *folio* 1313, incluſive.

An Exception to the Report was taken by the Defendant.

Attorney General and Mr. Fonblanque in ſupport of the Exception.—This is a queſtion of great importance to the practice of the Court. The courſe, this defendant has taken, by putting in a full anſwer at once, is better than making the anſwer to this injunction bill liable to exception, as not ſufficient; which would have greatly delayed the demand founded upon the award. The language of the bill calls in direct terms for this ſchedule. Neither a production of the firſt account nor of the ſecond could have anſwered the purpoſe. The Defendant was under the neceſſity of ſtriking a third courſe, relying upon neither his firſt nor his ſecond bill. A manifeſt purpoſe appears to call for a comparative detail, in order to form a comparative reſult of the two bills. How could the exigency of the bill be otherwiſe complied with, and the propriety of the charges vindicated? There are but two ways; either by leaving the accounts with his Clerk in Court, which he could not do, or by ſtating them in his anſwer. If he had left them with the Clerk in Court, it would have been a ſubject of exception, and would have been conſidered a very irregular attempt; for papers made out for the purpoſe are never left with the Clerk in Court: that courſe is taken only with papers of previous exiſtence for the ſake of proof. Another important conſideration is, that if it is ſufficient for the party to draw out a ſtatement by way of account inſtead of inſerting it in a ſchedule, it will take away the neceſſity of ſchedules, and will be very material with reſpect to the revenue ariſing from ſtamps. How could this comparative detail have got upon the Record and into the Maſter's Office in any other way? If it had been left with the Clerk in Court, it might after inſpection have been withdrawn; and no proceeding could have been had upon it.

Solicitor General and Mr. Johnſon for the Plaintiffs.—As to the objection from the danger of delay by leaving any opening for exception

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ception upon an injunction bill, this is not a bill of that deſcription, upon which an injunction can be obtained for want of an anſwer: it can be only upon the merits; for the proceedings at law are between Co-defendants; not with the Plaintiffs; who muſt ſhew a clear title to relief upon the merits, before they can poſſibly be entitled to an injunction. The Plaintiffs being deſirous of inveſtigating theſe charges call upon the Defendant to produce his books: but he chooſes to come to town, to put in his anſwer; and then ſays, he cannot make this, the moſt important, diſcovery, becauſe his papers and books were at *Congleton*. It was impoſſible for the Prothonotary to have any fair view of the ſubject. The Defendant might have ſaid, he had no demand except for the ſum awarded; the particulars of which conſiſt of the articles in the bill ſettled by the Prothonotary, from which he took certain *Items*; and the claim is for the remainder. As to the objection, that the bill deſires him to ſtate the difference between the two bills delivered, the Plaintiffs only deſire to aſcertain the fact, whether the ſecond bill is not the firſt, only increaſed in point of charge; and he admits, it is ſo. The Plaintiffs complain of the manner, in which this ſchedule is made out; which is groſsly improper, and can be intended only to prevent the progreſs of the ſuit. It is ſo contrived, that in ſome ſheets there are not twenty words; and there is great prolixity in the obſervations. I admit, generally ſpeaking, an executor or truſtee cannot refer to his accounts without ſetting them forth in a ſchedule: but that is a caſe of quite a different deſcription. The true diſtinction is, that a Defendant is not to refer to accounts made out for the purpoſe of the cauſe; but he may refer to thoſe things, which were in exiſtence previouſly to the cauſe. Suppoſe, a bill was filed by one partner againſt another for an account; and the Plaintiff calls upon the Defendant to ſtate all his demands with all the particulars relating thereto: are all the partnerſhip books to be ſtated? They are only to be referred to. The utmoſt would be to ſtate the reſult, debtor and creditor; which is all, the bill looks to.

When the anſwer is groſsly impertinent in a part, which cannot be ſeparated from the reſt, the Maſter ſtates the whole to be impertinent. If inſtead of ſtating the ſubſtance of a deed, (for which there is an expreſs Order of Court,) it ſtates the whole deed, the Maſter muſt report the whole anſwer impertinent.

Attorney General in reply.—The queſtion at preſent is only, whether that information, which is given, becauſe it is called for by the bill, is impertinent, though it is called for. How is it poſſible in any other way to anſwer the interrogatory, whether the *Items* of the ſecond bill of coſts, or ſome of them, are not ſimilar or nearly ſimilar to ſeveral or ſome of the *Items* of the firſt bill, or how otherwiſe; and whether ſome and which of the charges in the ſecond bill are not to a greater, and how much greater, amount than the charges ſet againſt the ſame kind of *Items* in the firſt bill? Is the Defendant at his own hazard to judge, how much of the information aſked for is neceſſary, and how much not; or in what way it ſhall be given? If he had left it in the Maſter's Office, and given an untrue account, he could not have been proſecuted for perjury for any part of his anſwer. The queſtion is only this: has he, who aſks for the information, a right to ſay, it is unneceſſary?

Lord Chancellor.—This ſchedule does not convey the leaſt degree of information upon the queſtion aſked by the bill, if that queſtion is to be taken in the latitude, that has been repreſented, ſo as to require every particular *Item* of the account to be ſet out. All, that is poſſibly to be learnt from the ſchedule, is, that he delivered one bill for one ſum, then another for another ſum. He has very unneceſſarily mentioned, wherein the articles contained in the former bill were increaſed, wherein they were diminiſhed, and where they were added to. A reference to the bills delivered, in the cuſtody of the executors, would have fully anſwered all that interrogatory. The ſcope of the bill is to aſk him to ſet out the heads of the one claim and the other, and how the ſum of 1175*l.* 9*s.* 8¼*d.* comes to be the balance. He might have ſaid, the Prothonotary ſtruck off ſo much; and therefore that ſum is the balance. The general ſtatement of the anſwer conveys juſt as much information as this ſchedule.

It is a certain fact from the nature of the caſe and from what is admitted in the anſwer, that the Plaintiffs, who have to pay theſe bills, if they are due, deſiring to take upon themſelves the

inveſtigation,

inveſtigation, the executors did not chooſe they ſhould do ſo; and in conſequence of that the proceeding in the Court of Common Pleas was a mere form; and in the taxation of the bill the Prothonotary allowed the charges, that might be proper, ſuppoſing, that buſineſs was done: the giſt of the caſe being, that there was no foundation for the charges. Then it is enormous to throw in this ſchedule at the end of the anſwer.

The Maſter is perfectly right. The Defendant muſt pay the coſts of the Exception.

END OF MICHAELMAS TERM.

SITTINGS AFTER

Michaelmas Term,

39 GEO. 3. 1798.

THELLUSSON v. WOODFORD.

WOODFORD v. THELLUSSON.

Dec. 5th 6th 7th 10th 11th, 1798. *April* 20th, 1799.

LORD CHANCELLOR,
MASTER OF THE ROLLS,
SIR FRANCIS BULLER, BART.
SIR SOULDEN LAWRENCE, KNT.

See report of same case when before the House of Lords vol. XI. p. 112.

PETER THELLUSSON, Eſq. by his will, dated the 2d of *April* 1796, after giving directions concerning his funeral, and ordering, that all his juſt debts be paid as ſoon as conveniently might be after his deceaſe, gives to his dear wife *Ann* 300 guineas, to be paid ten days after his death, and alſo all the wines and other liquors at his capital meſſuage at *Plaiſtow*, and all the corn, hay, and ſtraw, in the buildings or ſtack-yards belonging thereto, for her uſe and benefit; and all the jewels, watches, and trinkets, in her poſſeſſion or cuſtody. Then, after giving to his brother-in-law the Rev. *Matthew Woodford*, *James Stanley*, Eſq. and

Deviſe of real eſtates of the annual value of near 5000*l.*, and other eſtates directed to be purchaſed with the reſidue of the perſonal eſtate, amounting to above 600,000*l.* to truſtees and their heirs, *&c*, upon truſt during the lives of the teſtator's ſons, *A. B.* and *C.* and of his grandſon *D.* and of ſuch other ſons as *A.* now has or may have and of ſuch iſſue as *D.* may have and of ſuch iſſue as any other ſons of *A.* may have and of ſuch ſons as *B.* and *C.* may have and of ſuch iſſue as ſuch ſons may have as ſhall be living at his deceaſe or born in due time afterwards, and during the life of the ſurvivor to receive the rents and profits and from time to time to inveſt the ſame and the produce of timber, *&c*, in other purchaſes of real eſtates; and after the death of the ſurvivor of the ſaid ſeveral perſons, that the ſaid eſtates ſhall be divided into three lots, and that one lot ſhall be conveyed to the eldeſt male lineal deſcendant then living of *A.* in tail male; remainder to the ſecond, *&c*, and all and every other male lineal deſcendant or deſcendants then living, who ſhall be incapable of taking as heir in tail male of any of the perſons, to whom a prior eſtate is limited, of *A.*, ſucceſſively in tail male; remainder in equal moieties to the eldeſt and every other male lineal deſcendant or deſcendants then living of *B.* and *C.* as tenants in common in tail male in the ſame manner, with croſs remainders; or if but one ſuch male lineal deſcendant, to him in tail male; remainder to the truſtees, their heirs, *&c.* The other two lots were directed to be conveyed to the male deſcendants of *B.* and *C.* reſpectively in the ſame manner, and with ſimilar limitations to the male deſcendants of their brothers, and to the truſtees in fee; and it was directed, that the truſtees ſhould ſtand ſeiſed upon the failure of male lineal deſcendants of *A. B.* and *C.* as aforeſaid upon truſt to ſell and pay the produce to his Majeſty, his heirs and ſucceſſors, to the uſe of the Sinking Fund; the accumulation, till the purchaſes or ſales can take place, to go to the ſame purpoſe; with a direction, that all the perſons becoming entitled ſhall uſe the ſurname of the teſtator only. The truſts of the will were eſtabliſhed.

Emperor John Alexander Woodford, Eſq., each the ſum of 300 guineas, as an acknowledgment for the trouble they will have in the execution of the truſts of the will, and ſome ſmall legacies, he gives to the ſaid *Matthew Woodford*, *James Stanley*, and *Emperor John Alexander Woodford*, their heirs and aſſigns, his capital meſſuage at *Plaiſtow*, with the lands, gardens, *&c.* and the furniture of every deſcription, (except ſome family pictures, afterwards given to his eldeſt ſon) books, horſes, cattle, carriages, and implements of huſbandry, *&c.* which ſhall be in or upon the premiſes, in truſt to permit his wife to hold and enjoy the ſame during ſuch part of her life as ſhe ſhall continue a widow. He directs his truſtees to permit his wife to chooſe out of his plate for her own uſe, ſubject as after mentioned, any quantity not exceeding 1400 ounces (which is afterwards given among his three ſons and their iſſue upon her death or ſecond marriage); but theſe legacies and bequeſts and the other legacies after given to her are declared to be upon condition, that ſhe accepts the ſame in ſatisfaction of dower; and caſe of her refuſal he revokes the ſame; and directs them to ſink into the reſidue of his effects. He alſo directs, that upon the death or marriage of his wife the truſtees ſhall ſell the premiſes at *Plaiſtow*, with the furniture, *&c.*, the uſe whereof is given to his wife, by public ſale or private contract: in the latter caſe any of his three ſons, with preference in point of age, are to be at liberty to purchaſe by appraiſement; and the money to be produced by the ſale is directed to be conſidered as part of the reſidue of his perſonal eſtate.

The teſtator then directs a fund to be created of 22,000*l.* Bank Stock, and 600*l.* *per annum* Long Annuities, producing the annual ſum of 2140*l.*; the dividends and intereſt to be paid to his wife for her life, provided ſhe remains ſingle; but in caſe of her ſecond marriage he only gives to her the dividends of 5500*l.* part of the ſaid ſtock, and only 300*l.* part of the ſaid Long Annuities, and an annuity of 100 livres in the *French* funds for her life; and ſubject to her intereſt he gives the ſaid Bank Stock and Long Annuities among his ſons and daughters, *viz.* 4000*l.*, part of the ſaid Bank Stock, to each of his three ſons, and 4500*l.*, part of the ſaid ſtock, and the ſaid Long Annuities equally among his three daughters and their iſſue, as therein mentioned; and the remaining 5500*l.* Bank Stock he gives among his ſons and daughters and their iſſue, in ſuch ſhares as his ſaid wife ſhall appoint by will, and in default thereof equally among ſuch as ſhall ſurvive her, and the iſſue of thoſe, who ſhall be dead.

He gives to each of his ſons 7600*l.* to make the money already advanced to them 23,000*l.*, to each; and he gives to his ſons *Peter Iſaac Thelluſſon* and *George Woodford Thelluſſon*, each, a ſmall annuity in the *French* funds on their reſpective lives, and to his ſon *Charles Thelluſſon* 100*l.* on his life in the *Iriſh* Tontine.

The teſtator then, after long proviſions for arranging the ſettlement of the ſaid 4500*l.* Bank Stock and the Long Annuities among his three daughters and their iſſue, gives to each of his daughters *Ann Thelluſſon* and *Auguſta Charlotta Thelluſſon* 12,000*l.*; with various reſtrictions to prevent their marriage without the conſent of his wife and executors, and to ſecure a ſettlement of the ſaid legacies, and in ſome events to carry over great part of theſe proviſions for his daughters to his reſiduary perſonal eſtate.

He gives 100*l.* *Iriſh* Tontine to his eldeſt daughter, and various Life Annuities in the *French* funds to her and her two ſiſters, and his grandſon *John*, the eldeſt ſon of *Peter Iſaac Thelluſſon*, and two nephews-in-law, ſons of Col. *Woodford*.

He bequeaths his houſe and warehouſe in *Philpot-Lane* to his truſtees, in truſt to permit his three ſons to carry on their buſineſs for ſix years from his death; and if they or any of them continue in buſineſs to the end of that time, the property is in effect given to them, or ſuch of them as ſhall ſo continue the buſineſs; but if all of them ſhall quit buſineſs before the expiration of that time "(which," he adds, "I moſt earneſtly hope "and pray to God will never be the caſe)" he directs the truſtees to ſell the ſame, and to add the money ariſing from the ſale to his reſiduary perſonal eſtate.

He then makes ſome arrangements as to the income of two eſtates in *Montſerrat* and *Grenada*, and as to 250*l.* Long Annuities, held by him in partnerſhip with the repreſentatives of Mr. *Coſſart*; of which partnerſhip the teſtator's ſhare was fifteen ſixteenths. He then makes the following declaration:

"The proviſion, which I have made for my ſaid three ſons, "and the very great ſucceſs they have met with, will be ſuffi-

"cient to procure them comfort; and it is my earneſt wiſh and "deſire, that they will avoid oſtentation, vanity, and pompous "ſhew; as that will be the beſt fortune they can poſſeſs."

The teſtator then gives a legacy of 105*l.* to each of his ſaid nephews-in-law, ſons of Col. *Woodford*, at the age of twenty-one, to accumulate in the mean-time, ſubject to a power in his executors to apply the ſaid legacies for the advancement of the legatees during their minority, and with benefit of ſurvivorſhip; and in caſe of the death of both under twenty-one, theſe legacies with the accumulation are directed to ſink into the reſidue. He then gives rings of 50*l.* value to his three daughters-in-law and to his ſon-in-law; and after giving ſome other rings he bequeaths 1000*l.* to his executors, in truſt for his brother in *Switzerland* for life, and after his death for ſome nieces there, but in caſe of their death in the life of his brother to ſink into the reſidue.

Then after giving ſome family pictures and other ſpecific articles to his three ſons and his eldeſt grandſon he bequeaths the remainder of his plate, with his books, china, linen, wines, and the remainder of his pictures, and all the furniture at *Brodſworth*, except ſuch parts as the truſtees ſhall think neceſſary to be kept for the purpoſe of receiving any of them or of his ſons, who ſhall chooſe to go and ſpend a little time there occaſionally, in truſt to be ſold; and he directs, that the money ariſing therefrom ſhall compoſe part of the reſidue of his perſonal eſtate.

The teſtator then gives and deviſes all his eſtates, manors, meſſuages, lands, tenements, and hereditaments, at *Brodſworth* and other places in the county of *York*, and all the advowſons, right of patronage, and preſentation, of and to the church of *Marr*, and all the meſſuages or tenements, lands, hereditaments, or premiſes, for the purchaſe whereof he has entered into any contract or contracts in writing, with the benefit of ſuch contract and contracts reſpectively, and all other his real eſtates whatſoever and whereſoever, unto and to the uſe of his ſaid truſtees, their heirs and aſſigns, for ever, upon the truſts after mentioned.

And as to, for and concerning, all the reſt, reſidue, and remainder, of his perſonal eſtate of whatever nature, as well that, which he may be poſſeſſed of at the time of his deceaſe, as ſuch of the ſaid ſeveral ſums as are in the events and on the conditions and contingencies before mentioned directed to ſink into the reſidue, he gives and bequeaths the ſame to the ſaid truſtees, their executors, adminiſtrators, and aſſigns, upon truſt, that they ſhall, as ſoon as conveniently may be after his deceaſe, inveſt the ſame in the purchaſe of freehold eſtates of inheritance in fee-ſimple or of copyhold eſtates of inheritance in *England* (the copyhold eſtates not to exceed one-fourth of the premiſes to be purchaſed), upon the truſts after mentioned; and he directs, that his ſaid truſtees, their heirs and aſſigns, ſhall ſtand ſeiſed of the ſaid real eſtates deviſed to them, and of the freehold and copyhold eſtates directed to be purchaſed, upon the truſts and to and for the intents and purpoſes after mentioned.

The teſtator then declares the truſts, as follows:

" Upon truſt that they the ſaid *Matthew Woodford James*
" *Stanley* and *Emperor John Alexander Woodford* and the ſurvi-
" vors and ſurvivor of them and the heirs and aſſigns of ſuch
" ſurvivor do and ſhall from time to time during the natural
" lives of my ſons *Peter Iſaac Thelluſſon George Woodford Thelluſſon*
" and *Charles Thelluſſon* and of my grandſon *John Thelluſſon* ſon
" of my ſaid ſon *Peter Iſaac Thelluſſon* and of ſuch other ſons as
" my ſaid ſon *Peter Iſaac Thelluſſon* now has or may have and of
" ſuch iſſue as my ſaid grandſon *John Thelluſſon* may have, and of
" ſuch iſſue as any other ſons of my ſaid ſon *Peter Iſaac Thel-*
" *luſſon* may have and of ſuch ſons as my ſaid ſons *George Wood-*
" *ford Thelluſſon* and *Charles Thelluſſon* may have and of ſuch iſſue
" as ſuch ſons may have as ſhall be living at the time of my
" deceaſe or born in due time afterwards and during the natural
" lives and life of the ſurvivors and ſurvivor of the ſeveral perſons
" aforeſaid collect and receive the rents and profits of the manors or
" lordſhips meſſuages lands tenements and hereditaments herein-
" before by me deviſed and ſo to be purchaſed as aforeſaid."

The teſtator then directs, that his truſtees ſhall from time to time inveſt the money to ariſe from ſuch rents and profits in ſuch purchaſes as he has before directed to be made with his perſonal eſtate, and from time to time receive and inveſt the rents or profits of ſuch eſtates to be purchaſed as laſt aforeſaid, in the ſame manner; and he directs his truſtees from time to time to cut ſuch timber upon the eſtates deviſed and to be purchaſed, as

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ſhall be fit to be cut, and to ſell the ſame, and inveſt the money ariſing by ſuch ſales in ſuch purchaſes as are directed to be made with his perſonal eſtate and the rents and profits of the real eſtates deviſed and directed to be purchaſed; and he empowers them to make leaſes generally for ſuch rents and under ſuch ſtipulations, as to them ſhall ſeem proper, and generally to act in the management of the ſaid truſt eſtates, as if the ſame were their own; and he directs, that after the deceaſe of the ſurvivor of the ſaid ſeveral perſons, during whoſe lives the rents and profits of the eſtates deviſed and to be purchaſed are directed to accumulate, an equal partition ſhall be made of the ſaid eſtates, the whole to be divided into three lots of equal value, or as near thereto as poſſible.

The will then proceeds to direct the limitations in the following manner:

" And that the premiſes contained in one of ſuch allotments " ſhall be conveyed to the uſe of the eldeſt male lineal deſcendant then living (and who ſhall be entitled to the firſt choice " of ſuch allotments) of my ſaid ſon *Peter Iſaac Thelluſſon* in " tail male with remainder to the ſecond third fourth and all " and every other male lineal deſcendant or deſcendants then " living who ſhall be incapable of taking as heir in tail male of " any of the perſons to whom a prior eſtate is hereby directed " to be limitted of my ſaid ſon *Peter Iſaac Thelluſſon* ſucceſſively " in tail male with remainder in equal moieties to the eldeſt and " every other male lineal deſcendant or deſcendants then living " of my ſaid ſons *George Woodford Thelluſſon* and *Charles Thelluſſon* as tenants in common in tail male in the ſame manner " as hereinbefore directed with reſpect to the eldeſt and every " other male lineal deſcendant or deſcendants of my ſaid ſon " *Peter Iſacc Thelluſſon* with croſs remainders between or among " ſuch male lineal deſcendants as aforeſaid of my ſaid ſons *George* " *Woodford Thelluſſon* and *Charles Thelluſſon* in tail male or in caſe " there ſhall be but one ſuch male lineal deſcendant then to ſuch " one in tail male with remainder to the uſe of them the ſaid " *Matthew Woodford James Stanley* and *Emperor John Alexander Woodford* their heirs and aſſigns for ever upon the truſts " and to and for the intents and purpoſes hereinafter mentioned " expreſſed and declared of and concerning the ſame."

The premiſes included in one other of ſuch allotments are in the ſame manner directed to be conveyed to the uſe of the eldeſt male lineal deſcendant then living (to have the ſecond choice of ſuch allotments) of the teſtator's ſon *George Woodford Thelluſſon*; with ſimilar limitations to his ſecond, third, fourth, and every other male lineal deſcendant, &c. and to the male lineal deſcendants of *Peter Iſaac Thelluſſon* and *Charles Thelluſſon* in moieties, with croſs remainders among them, and the ultimate remainder in the ſame manner to the uſe of the truſtees in fee upon the truſts after mentioned.

The conveyance of the premiſes included in the remaining lot is directed in the ſame manner to the uſe of the eldeſt and other male lineal deſcendants of the teſtator's ſon *Charles Thelluſſon* then living; with ſimilar limitations in remainder to the male lineal deſcendants of his two brothers, and to the truſtees in fee.

The teſtator then directs, that his ſaid truſtees, their heirs and aſſigns, ſhall ſtand and be ſeiſed of the ſaid eſtates, by him deviſed and ſo to be purchaſed, upon failure of male lineal deſcendants of his ſaid ſons *Peter Iſaac Thelluſſon*, *George Woodford Thelluſſon*, and *Charles Thelluſſon*, as aforeſaid, in truſt to ſell all the ſaid eſtates; and that they ſhall pay the money to ariſe from the ſale or ſales of the ſaid eſtates, deviſed and ſo to be purchaſed, as aforeſaid, unto his Majeſty, his heirs and ſucceſſors, Kings and Queens of *England*, to be applied to the uſe of the Sinking Fund, in ſuch manner as ſhall be directed by Act of Parliament; and he directs, that in the mean time from and after ſuch failure of male lineal deſcendants of his ſaid three ſons and until the ſale or ſales of the ſaid eſtates deviſed and to be purchaſed the rents and annual profits thereof ſhall be applied and diſpoſed of in the ſame manner and for the ſame purpoſes as the intereſt of the money to ariſe by ſuch ſale or ſales would be applicable to.

The teſtator then reciting, that his truſtees may not be able to find convenient purchaſes wherein to lay out his perſonal eſtate, and the money, which ſhall ariſe from time to time by the rents and profits of any lands to be purchaſed, as aforeſaid, or by the ſale of timber, may not, as the ſame ſhall from time to time accrue, amount to a ſufficient ſum to make proper purchaſes, empowers his truſtees and the ſurvivors or ſurvivor of them, his executors, adminiſtrators and aſſigns, in the mean time, and until a convenient purchaſe or convenient purchaſes can be made, to permit ſuch part of his ſaid perſonal eſtate, as is now inveſted in the funds, or conſiſts of ſecurities for money, to remain in ſuch funds or upon ſuch ſecurities; and to inveſt the money to ariſe from ſuch part of his ſaid perſonal eſtate, as ſhall not at his deceaſe conſiſt of money, and from the rents and profits of the eſtates to be purchaſed purſuant to the directions of his will, or from the ſale of timber upon ſuch eſtates, in any of the public funds, or on any Government or real ſecurities, with power to change the ſecurities, as the ſaid truſtees *&c.* ſhall think proper, until a convenient purchaſe or convenient purchaſes can be found, or until a ſufficient ſum of money ſhall be accumulated to make a proper purchaſe or proper purchaſers; and he declares, that the intereſt, dividends, and annual produce, of the ſaid ſtocks, funds, and ſecurities, ſhall accumulate in the ſame manner, and for the ſame purpoſes as the rents and profits of the lands to be purchaſed, as aforeſaid, are before directed to accumulate.

The teſtator then, after the uſual clauſe for the protection and indemnity of the truſtees, in which he expreſsly orders, that his ſaid truſtees, or any truſtee to be hereafter appointed, ſhall never permit a larger ſum than 500*l.* to remain at any one time in the hands of any private banker, but that all the monies, which they ſhall receive, exceeding that ſum, ſhall, when received, be paid into the Bank of *England*, there to remain, until laid out, as before directed, and after directing the truſtees to appoint ſome other truſtees, in caſe they or any of them ſhall deſire to be diſcharged, and to transfer, convey, and aſſign, to ſuch new truſtees, with reſpect to the ſaid advowſon, and any other advowſon, right of patronage, and preſentation, belonging to any other eſtate, that may be purchaſed, directs, that his truſtees ſhall, when and as the ſame ſhall reſpectively become void, preſent according to the nomination of one of his ſaid ſons in rotation; the eldeſt having the firſt nomination; and the like nomination to be made by the eldeſt male lineal deſcendant of his ſaid three ſons reſpectively in the order and rotation aforeſaid, if he be capable by law of making ſuch nomination, when the church becomes vacant, or in due time afterwards: otherwiſe the eldeſt male lineal deſcendant of the next brother to preſent to ſuch living; and if, when ſuch livings or living ſhall reſpectively become void, or in due time afterwards, no male lineal deſcendant of any of his ſaid ſons ſhall be capable of preſenting thereto, he directs his truſtees for the time being to preſent.

He farther directs, that from the reſpective time or times any perſon or perſons ſhall become entitled either to any part, ſhare or proportion, of the aforeſaid eſtates and premiſes, as well thoſe deviſed, as what may hereafter be purchaſed in manner aforeſaid, or to the whole thereof, he and they, and all claiming under him and them reſpectively, ſhall from thenceforth, thereafter, at all times, ſeverally and reſpectively, uſe the ſurname of *Thelluſſon* only; and in default thereof he orders and directs, that the ſeveral eſtates before deviſed and to be purchaſed, as aforeſaid, ſhall be thereupon ſold, and the money to ariſe from the ſale or ſales thereof, be paid unto his Majeſty, his heirs and ſucceſſors, Kings or Queens of *England*, to the uſe of the Sinking Fund, in ſuch manner as ſhall be directed by Act of Parliament.

The will then proceeds thus:

"As I have earned the fortune which I now poſſeſs with in-
"duſtry and honeſty I truſt and hope that the Legiſlature will not
"in any manner alter my will or the limitations thereby created
"but permit my property to go in the manner in which I hereby
"diſpoſe of it."

The teſtator then directs, that the rent of his houſe in *Philpot-Lane* ſhall during the continuance of the ſaid term of ſix years be received by his truſtees half yearly; and that ſuch rent, when and as the ſame ſhall be received, do compoſe part of the reſidue of his perſonal eſtate. In caſe his daughters *Ann* and *Auguſta Charlotte* ſhall marry in his lifetime, he revokes the legacies of 12,000*l.* before given to them.

In caſe he ſhall in his lifetime enter into any contracts for the purchaſe of any lands, tenements, or hereditaments, and ſhall happen to die, before the neceſſary conveyances are executed, he orders and directs, that all and every ſuch contract or contracts ſo entered into by him, as aforeſaid, ſhall be completed and carried into execution by his ſaid truſtees after his death; and that the purchaſe-monies for ſuch reſpective eſtates and premiſes ſhall be paid by them, by, with, and out of, his perſonal eſtate and effects; and that the deeds and conveyances thereto reſpectively ſhall be made to them, their heirs and aſſigns; and that they and every of them ſhall ſtand, remain, and be, ſeiſed and poſſeſſed of all and ſingular the premiſes ſo to be conveyed upon, under and ſubject to, ſuch and the ſame uſes, truſts, limitations, proviſoes, and conditions, as are in and by his will created, expreſſed, and declared, of and concerning the eſtates thereby directed to be purchaſed with the aforeſaid reſidue of his eſtate and effects in manner before-mentioned.

In caſe of the death of any of his truſtees in his lifetime the teſtator appoints Mr. *George Hibbert* a truſtee in the place of ſuch deceaſed truſtee; and in that event, the teſtator gives *Hibbert* the like ſum of 300 guineas; he taking upon himſelf the burthen of the execution of the truſts of the will. The teſtator concludes, by appointing his ſaid three truſtees and his wife, executors and executrix of his will.

The teſtator died on the 21ſt of *July* 1797. At the time of his death, the ſtate of the family was as follows:

He left ſurviving him his wife; and three ſons; *Peter Iſaac Thelluſſon*, his eldeſt ſon and heir at law, of the age of thirty-ſix years, *George Woodford Thelluſſon*, of the age of thirty-three years, and *Charles Thelluſſon*, of the age of twenty-eight years, all married: Three daughters; *Maria*, married to The Honorable *Auguſtus Phipps*; *Ann Thelluſſon*, and *Auguſta Charlotte Thelluſſon*.

His grandchildren were, *John Thelluſſon*, of the age of eleven years; *George Thelluſſon*, of the age of ſix years; *Henry Thelluſſon*, of the age of five years; *Frances Thelluſſon*, of the age of ſeven years; and *Carolina Thelluſſon*, of the age of four years; all the children of *Peter Iſaac Thelluſſon*: *Mary Ann Thelluſſon*, of the age of ſeven years; and *Georgiana Thelluſſon*, of the age of two years, the only children of *George Woodford Thelluſſon*; and *Charles Thelluſſon*, of the age of five months, the only ſon of the teſtator's ſon *Charles Thelluſſon*.

At the time of the teſtator's death the lady of his ſon *Peter Iſaac Thelluſſon* was pregnant; and ſoon afterwards ſhe had twin ſons born, *viz.* *William Thelluſſon*, and *Frederic Thelluſſon.*

Upon this caſe two ſuits were inſtituted:

The firſt aroſe upon a bill filed by the widow and children of the teſtator againſt the acting truſtees and executors, the two ſons of *Peter Iſaac Thelluſſon* born ſince the death of the teſtator, and the *Attorney-General*, to have the truſts of the will declared void, and the real eſtate conveyed to the plaintiff *Peter Iſaac Thelluſſon*, as heir at law, and the perſonal eſtate divided among the plaintiffs, according to the Statute of Diſtributions.

The other cauſe was inſtituted by the truſtees, to have the directions of the Court for eſtabliſhing the truſts of the will.

The bill prayed the neceſſary directions for that purpoſe, and that it might be declared, whether *Peter Iſaac Thelluſſon*, as heir at law of the teſtator, was or was not entitled to ſuch parts or particulars of his real eſtate, as were conveyed to him after making his will, and alſo to ſuch particulars of his real eſtates as were purchaſed, contracted or agreed to be purchaſed, by the teſtator after making his will, and to have ſuch of the ſaid contracts, as remained unperformed at his deceaſe, completed for the benefit of his ſaid heir at law, and to have the purchaſe-money paid out of the perſonal eſtate of the teſtator; and particularly, that it might be declared, whether the heir was entitled both to ſuch laſt-mentioned real eſtates, and alſo to the legacies and bequeſts in the will; and if not, then that he might be put to his election.

The teſtator within a month before his death contracted for the purchaſe of real eſtates to the extent of 30,000*l.*

The property, upon which the truſts were to attach, conſiſted of real eſtates in *England*, of the annual value of above 4500*l.*, ſome real eſtates in the *Weſt Indies*, and perſonal property eſtimated at above 600,000*l.* Various calculations were made as to the probable reſult of the accumulation. According to the loweſt computation, ſuppoſing the ſurvivor of the perſons, during whoſe lives the accumulation was to continue, ſhould live ſeventy years, the property at the end of that period, if improved at compound intereſt, at the rate of 5 *per cent.* would amount to above nineteen millions ſterling. Other calculations upon different *data* carried it much higher.

The cauſes were firſt opened in *Michaelmas* Term before the Lord Chancellor; when his Lordſhip ſaid, the caſe was of great importance and a good deal of novelty; and he could not do better for the accommodation of the parties, than by aſking the opinion of two of the Judges; which would be better than framing any caſe for a Court of Law; and indeed, being the direction of a truſt, it ſeemed more proper for this Court.

Lincoln's-Inn-Hall, *Dec.* 5th, &c.

Mr. Mansfield, *Mr. Grant*, *Mr. Hargrave* (*a*), *Mr. Cox*, *Mr. Hubberſty*, and *Mr. Greenhill*, *for the widow and children of the teſtator.*—The diſpoſitions made by this will are without example, unnatural, and abſurd. The object is the accumulation of immenſe maſſes of landed property in the hands of a few individuals; an object impolitic and pernicious. To effect that purpoſe the teſtator withdraws from enjoyment for a long ſeries of years a very conſiderable portion of property. Moſt attempts to create perpetuities are made with a view to continue the enjoyment of property for a long ſeries of years in the families of the teſtators. But this teſtator contrives, how long it is poſſible to keep any of his deſcendants from the enjoyment of his property. No one, who had ever breathed the ſame air with him, could inherit. He excludes three generations from all chance; not from any diſſatisfaction; for there was no ground for it, nor was he diſſatisfied with any branch of his exiſting progeny; not in favor of any perſon, whom upon a rational motive he could prefer to them, but an unknown perſon, whom at ſome future period it will be difficult for the Court to aſcertain. From the direction as to the ſurname of *Thelluſſon* it is to be inferred, that the deſcent is not to be confined to the male line. Suppoſe the queſtion to ariſe between the ſon of a daughter and the grandſon of a ſon in the male line: which of thoſe perſons would be entitled?

(*a*) Mr. *Hargrave's* argument, comprehending a very able hiſtorical account of the riſe and progreſs of Executory Deviſe, is ſeparately ſtated. The argument at large is publiſhed by Mr. *Hargrave* in his *Juridical Arguments*, vol. 2.

But

But the queſtion is undoubtedly, not whether this is politic, but whether it is legal? and in that point of view three queſtions ariſe:

1ſt, Whether the teſtator has in direct terms tranſgreſſed the boundary of Executory Deviſe, by making the limitation depend upon the lives of perſons, not neceſſarily to come into exiſtence before his death:

2dly, If the firſt point is againſt us, whether according to the ſenſe and ſpirit of the rule as to Executory Deviſe it is lawful to aſſume the lives of a number of perſons and claſſes of perſons in no way connected with the immediate enjoyment, for the mere purpoſe of protracting the veſting and alienation; ſuppoſing, the alienation may be protracted for that time:

3dly, Whether the enjoyment as well as the alienation of property can conſiſtently with the principles of law be prevented by the ſame means for the ſame period.

The firſt is merely a queſtion of conſtruction. As the deſign moſt evidently is to abuſe the indulgence given to teſtators for very different purpoſes, this teſtator is not entitled to any aſſiſtance in the execution of that deſign. The incidental inconvenience of rendering the property unalienable, till the time at which the limitation is either to take effect or to fail, was tolerated on account of the purpoſe, for which it was uſed: but the teſtator uſes the power for the expreſs purpoſe of preventing the alienation. The inconvenience attending the privilege is with him the ſole object of its exerciſe. He ſays, he will defraud the law, if he can, under the cover of its own rules. He does not wiſh to continue the property in his family, but to preclude his family and all mankind from alienating, and even enjoying, his property during the longeſt poſſible period. It was not, ſurely, for that purpoſe that Executory Deviſe was permitted? If the Court is bound to ſay, that attempt is lawful, there is no rule calling upon the Court as a duty, if he has executed it inſufficiently, to interfere, and aid him in making the diſpoſition more complete. The words of reſtriction are naturally connected only with the preceding ſentence. Unleſs the Court tranſpoſes them, and connects them with the other parts, the limitations are clearly too remote. The ſenſe does not require that application; on the contrary it will be embarraſſed and obſcured by ſuch tranſpoſition. It is complete, as it now ſtands. Nothing is wanting to give it meaning.

ing. The word "*ſuch*" in every preceding part has its relative "*as*:" but the Court is called upon to give it a ſecond relative. The rule, "*Ad proximum antecedentem fiat relatio*, "*niſi impediatur ſententia*," is a rule of grammar, of law, and of common ſenſe. That law implies, that there may be a reference to a former antecedent; but forbids it, unleſs upon neceſſity. The Court will not tranſpoſe the words for the mere purpoſe of rendering the meaning legal. If that could be done, the Court muſt proceed arbitrarily, by applying thoſe words to ſome members only of this ſentence; others not requiring that application. They can have no application to the two firſt members of the ſentence, *viz.* the teſtator's ſons, and his grandſon *John*. The whole of the reſtrictive phraſe does not apply to the whole of the third member of the ſentence: but it muſt be contended, that it ought to be applied to ſome of it. The latter branch of the reſtriction, "*or born within due time afterwards*," is utterly inapplicable to the ſons *Peter Iſaac Thelluſſon* now has. Your Lordſhip therefore muſt apply theſe words to ſuch other ſons, as he may hereafter have; dividing in the middle, and tranſpoſing, the ſentence. Such a conſtruction never was put upon any will, even for the moſt rational purpoſe. The word "*ſuch*" is the only pretence for the application of the word "*as*:" but the former word muſt be removed from its proper place, in order to exclude the ſons *Peter Iſaac Thelluſſon* now has, and prefixed to thoſe ſons, he may have afterwards. There is leſs difficulty in this operation as to the other members of the ſentence; *viz.* ſuch iſſue as the grandſon *John* may have, ſuch iſſue as any other ſons of *Peter Iſaac Thelluſſon* may have, and ſuch ſons as *George Woodford Thelluſſon* and *Charles Thelluſſon* may have: but it is neceſſary in the fifth to introduce the qualifying words, not at the end, but in the middle of the ſentence; for it is the word "*iſſue*" that requires the guard. The Court therefore can proceed by no uniform rule in the application of the reſtrictive words; but muſt apply them arbitrarily, according to the exigency of the will, as the teſtator ought to have applied them, to make his intention legal. That the Court is neither bound nor authoriſed to do. If the caſe was much more ſimple, they could not be ſo applied without evident neceſſity.

Next, as to the meaning of the words "*born within due time afterwards*": as uſed in this will they are abſurd. Where a man is bequeathing to his own family, thoſe words can only mean poſthumous children, with a view to legitimacy: but, where they are referred to a ſtranger, it is difficult to conceive, in what ſenſe they can be meant; for the legitimacy of one man's child does not depend upon its being born in due time after the death of another perſon. He may have thought twenty-one years the due time. It muſt appear clearly, that he meant children in the womb. That intention cannot be inferred, merely becauſe the other would be illegal. The common point upon the words "*dying without iſſue*" illuſtrates this. If this ſpecies of argument can be allowed, that point could never ariſe; it would be ſaid, the teſtator could not mean a general failure, but that he intended only to do what the law allows. Suppoſe, he meant nothing more than children in the womb: can a teſtator aſſume ſuch lives for the purpoſe of carrying on a truſt of accumulation of this nature? Children not actually born are for many purpoſes conſidered as perſons in exiſtence. Wherever it is for their own benefit, they are ſo conſidered. That, however, was not always the rule. Till the Statute of *Will.* 3. (*a*) a child *en ventre ſa mere* was not held in exiſtence, ſo as to be capable of taking a contingent remainder. But there is no caſe in which ſuch child has been conſidered in exiſtence, where it is no benefit to him to be ſo conſidered. The rule has never gone farther.

Wallis v. *Hodſon*, 2 *Atk.* 114. *Barn. Ch. Rep.* 272. ſhews the mode, in which that diſtinction found its way into our Courts. The report in *Barnardiſton* is much the beſt, and tallies with Mr. *Foreſter's* manuſcript note. The queſtion was, whether a child born after the death of a brother, who died inteſtate, was entitled to a ſhare, under the Statute 1 *James* 2. *c.* 17. *ſ.* 7. Lord *Hardwicke* decided in favour of the poſthumous child, and goes fully into this queſtion; adopting the rule of the Civil Law, that a child *en ventre ſa mere* is to be conſidered as in exiſtence for its benefit; though not, where it may be to its prejudice, or to the benefit of another perſon. Lord *Hardwicke* followed that up in *Millar* v. *Turner*, and *Burnet* v. *Mann*, 1 *Veſ.* 85. 156. The ſame idea appears in *Beale* v. *Beale*, *Northey* v. *Strange*, and *Burdet* v. *Hopegood*, 1 *P. Wms.* 244. 340. 486. Some of theſe caſes do not depend upon the law of the Eccleſiaſtical

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(*a*) 10 & 11 *Will.* 3. *c.* 16.

Court; and in *Beale* v. *Beale* the reaſon is ſtated, that Equity ſhould conſider ſuch child, in order to its being *provided for*? Thoſe words are in all the editions printed in Italics; which ſhews the ground, upon which it was determined.

In *Doe* v. *Clarke*, 2 *H. Black.* 399. Mr. Juſtice *Buller* ſays, the doctrine is well ſummed up in *Watkin's Treatiſe upon Deſcents* to the extent, I have ſtated. That caſe is a ſtrong authority in favour of the diſtinction. There is no inſtance, where it has been applied to prolong the period, at which the limitation is to veſt. Here certainly it is not for the benefit of the unborn children to be conſidered in exiſtence. It would be to their prejudice; for upon that principle they are precluded from the enjoyment of this property. They would have a chance of ſucceeding, if they are not conſidered in exiſtence; for they might anſwer the deſcription of eldeſt male lineal deſcendant at the expiration of all the other lives.

Second General Queſtion.—Executory deviſes were firſt permitted for purpoſes of general convenience, ſubſervient to family arrangements, which it may be very fitting to make, but which could not be made in ſtrict conformity to the rules of law. They were an indulgence granted to men in their laſt wills. The caſes therefore are caſes of deviation from the ſtrict rules of law, of privilege conferred upon teſtators, not abridgment of any rights, which men antecedently enjoyed. They did not limit the diſpoſitions, that men might previouſly have made; but they permit them to make diſpoſitions, they could not antecedently have made. The indulgence cannot therefore be extended any farther than it is given. It has never been extended certainly to the length now claimed. But it will be ſaid, phraſes and expreſſions are to be found warranting the whole length of this diſpoſition. They muſt be conſidered with reference to the caſes, in which they are found, and the uſe, that had been made of the exiſting lives. Certainly it has been ſaid over and over again, that the period for an Executory Deviſe is a life or lives in being and twenty-one years afterwards, and a few months, to allow for the birth of a poſthumous child; and that in effect the veſting is reſtrained only during the life of the ſurvivor. Upon reference to the decrees and the limitations in thoſe caſes it is evident, the Judges in uſing ſuch expreſſions never had ſuch a caſe as this in their contemplation. The deſign of tying up property and rendering it unalienable never was favored in this Country. It was indulged to enable men to make diſpoſitions, which the exigency of the family might require, notwithſtanding the tendency to make the property unalienable. In *Pells* v. *Brown* (a) the contingency muſt neceſſarily have happened in a ſingle life in being; and the property was not kept from enjoyment in the mean time: it belonged in the interval to the firſt deviſee. The Court was with difficulty perſuaded to go any farther. In *Snow* v. *Cutler*, determined in the reign of *Charles* II., the Court was equally divided upon the queſtion of allowing fourteen years beyond a life in being: but as to a life in being they were agreed. The period, at which it received its preſent extent, was towards the latter end of that reign in *Taylor* v. *Bydall* referred to in the certificate in *Stephens* v. *Stephens*, *For.* 232. That is the utmoſt latitude, to which it has ever been carried; for it is no extenſion of that to allow time for the birth of a poſthumous child, upon the rule, that ſuch child is to be conſidered born for any purpoſe for its own benefit. So averſe were the Courts from the extenſion of the period, that the doctrine of that caſe was not ultimately ſettled till 1736. Not long afterwards the queſtion occurred in the Court of Chancery, upon a ſhifting uſe ſuſpended till a year after the expiration of two lives in being, in *Lloyd* v. *Carew*. The Court of Chancery held it void: but that decree was reverſed by the Houſe of Lords. In *The Duke of Norfolk's Caſe* it was queſtioned, whether a term for years could be limited ſo that upon the death of one perſon without iſſue of his body during a life in being it ſhould go over to another. Lord *Nottingham* conſidered that a contingency, that muſt be determined within a life in being. The difference of opinion upon that caſe ſhews, with what reluctance the Judges gave way to any extenſion of the original rule in *Pells* v. *Brown*. In *Scatterwood* v. *Edge* the matter was much debated. All agreed, that, if it was within the compaſs of *a* life in being, it was good: ſo it was ſtated by the Chief Juſtice and Mr. Juſtice *Powell*: but they doubted much, whether it could go any farther. There is only one caſe of antiquity, in which the conſideration occurred as to more lives than one co-exiſting. That was *Goring* v. *Bickerſtaffe*, upon a term for years; in which caſe the phraſe was firſt uſed, that *all the candles were burning at the ſame time;* which is attributed to Mr. Juſtice *Twiſden*: but that was ſaid with reference to the caſe before the Court; which was a caſe of two lives only. To ſuch a limitation there can be no reaſonable objection; for it is by analogy to the rules of the common law; which is noticed as the ground of executory deviſe by Lord *Kenyon* in *Long* v. *Blackall*. By that analogy the property may be made unalienable for the ſame period and by the ſame means: but does the analogy warrant taking lives, who are not all connected with the enjoyment, for the purpoſe of keeping it unalienable? In every caſe the life has been that of a perſon in ſome degree connected in intereſt with the limitations. The caſe, in which the life was moſt remote from any intereſt of his own in the eſtate, has been a deviſe in fee to the ſon of *A.*, at twenty-one, and if he ſhould die before twenty-one, then to the heir of the body of *A.*, that ſhould attain that age. That was the caſe of *Taylor* v. *Bydall*. The life of the huſband of the deviſor's ſiſter was naturally taken as ſubſidiary to the direct object in view. The deviſor did not mean to give the eſtate to the huſband of his ſiſter: he did mean to give it to their iſſue: but he did not mean it to veſt, unleſs that iſſue ſhould attain twenty-one. The life of his ſiſter's huſband was therefore properly aſſumed to aſcertain the perſon. That was not taking lives of abſolute ſtrangers to the eſtate for the bare purpoſe of preventing alienation. If this is allowed, any claſs of men might be taken for that purpoſe; provided the deſcription was ſuch as to afford a ſufficient degree of certainty: for inſtance, all the members of both Houſes of Parliament; all the members of both Univerſities; and much more numerous bodies: I am now ſuppoſing, the object is merely to prevent alienation; and that during the time the eſtate would be enjoyed by the heir or by ſomebody. The Court would ſay, that was a fraud upon the rule; that it was not the purpoſe, for which the rule was introduced. All the ſhifts, men have reſorted to, in order to prevent eſtates in tail from being barred by recovery, have been oppoſed. Upon the ſame principle, upon which the attempts in *Humberſton* v. *Humberſton*, 1 *P. Wms.* 332. and in *The Duke of Marlborough's Caſe*, were reſiſted, the Court will interfere in this inſtance, where the pure purpoſe is to render the property unalienable.

(a) For the references ſee Mr. *Hargrave*'s argument.

Third General Queſtion.—Executory Deviſe is merely a mode of entailing property. It has the ſame effect of rendering property unalienable for a certain period. But an entail precluding enjoyment is wholly unknown. No ſuch entail has hitherto been made by any diſpoſition, that can take effect according to the rules of the Common Law. Executory deviſe is adopted by analogy to thoſe rules; and teſtators are permitted to tie up property during the ſame period, during which it may be done by a regular entail under a common law conveyance. Preventing enjoyment is a much ſtronger exerciſe of dominion than the preventing alienation. It does not follow, that you can prevent enjoyment, becauſe you can direct the courſe of it; or that you can prevent it for the ſame period that you can regulate it. No law of any country has made any ſtatutary, poſitive, proviſion againſt it: whereas the law of almoſt every country contains proviſions againſt the much leſs inconvenience ſuppoſed to reſult from entail. That proves the argument. In the *Roman* Law at firſt any thing in the nature of entail was altogether unknown. It was introduced under the color of *fidei commiſſa*, firſt, to defraud the rule, and give to perſons, incapable of taking property, by a bequeſt to a perſon capable, enjoining him to deliver it to the incapable perſon. It was afterwards converted to another uſe, the ſame that entail anſwers in this country; viz. to continue property in a ſucceſſion of perſons, whom the teſtator ſhould previouſly point out. Alienation was prevented, but not enjoyment. Even this was found ſo inconvenient, that ſeveral laws were made to prevent thus entailing and rendering unalienable the whole of the property, entitling the firſt taker to retain to himſelf a certain portion; the truſt being good, for inſtance, with regard to only three-fourths; and the truſtee being entitled to retain one-fourth. In moſt countries the rule of the *Civil Law* has been adopted; and perpetual entails have been permitted, until poſitive ſtatutes have interfered to effect a boundary to them. In almoſt every country there is ſuch a boundary. By the old law of *France* there could be no entail beyond two degrees. In the hands of the third taker the property became free from every reſtraint and alienable. It is evident, it cannot be ſuppoſed, the juriſdiction of thoſe countries permitted indefinitely property to be tied up from enjoyment: elſe your Lordſhip would find laws reſtraining that, by much the greater inconvenience. By the law of *Scotland* perpetuity of entail is permitted under certain regulations preſcribed by poſitive ſtatute. If it is to be contended, that truſt of accumulation is co-extenſive with ſuſpenſion of alienation, it muſt be argued, that by the law of

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of *Scotland* a perpetual truſt of accumulation muſt be tolerated; for ſo long, no doubt, you may render land unalienable there; provided the perſons exiſt. Our Courts certainly never expreſſed any apprehenſion of danger, except that Executory Deviſe tended to render property unalienable. Would they have gone this length, if they had been told, that ſo long as they reſtrained alienation they reſtrained enjoyment? Would Lord *Nottingham* have ſaid, there was no inconvenience in this; profeſſing, that the Courts ought to ſtop, wherever there was inconvenience? There may be a difference of opinion upon the former inconvenience: there can be none upon the latter. If all the lands of *England* were to remain unalienable in the hands of the preſent poſſeſſors, perhaps it might be ſaid, no ſenſible inconvenience would ariſe: but if the rents of all the lands in *England* were for ten years put out of enjoyment, or directed to ſome particular purpoſe, the whole œconomy of ſociety would be deranged. Compare this truſt with the laws of this country reſpecting *Mortmain*; always remembering, that in thoſe diſpoſitions the profits are ſpent, and the Public have the benefit of it.

It is impoſſible to aſſert, that truſts of accumulation are altogether new, and unknown to the Courts of Juſtice, or wholly without their ſanction. In caſes of infancy a very ſmall portion of the income can be employed during the minority: the reſt muſt be unapplied. A direction to lay it out in land does not carry it to any other than the natural channel. There have been inſtances for a longer time; *viz.* a life in being: but that it has ever gone to the extent now attempted, will not be aſſerted. If this was ſuppoſed to be allowable, no perſon was more likely to have done it than the celebrated Mr. *Hopkins* (*a*). Lord *Hardwicke* ſays, the teſtator could not frame a will ſo that no one ſhould take his eſtate; if he could, he would have done ſo. That was not thought practicable at that time. The attention of the Court having never been ſtrongly called to truſt of accumulation, it is as open to the Court at this day to fix the boundary, as it was formerly. At that time an argument was drawn as to reſtraint of alienation from the inconvenience. In this caſe the inconvenience is much ſtronger. Entail only keeps the fee of the land unalienable, leaving the expenditure of the produce free to flow through all

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(*a*) See *Hopkins* v. *Hopkins*, *For.* 44. 1 *Vern.* 268. 1 *Atk.* 581. 1 *Veſ.* 268. Mr. *Butler's* note 231. *Co. Lit.* 271. *b.*

all the channels, in which it would circulate. This project diſturbs the whole œconomy of ſociety by confining the diſpoſition of income to one application, and amaſſing an overgrown property. By the execution of this plan only a revenue equal to the Civil Liſt of this country may by no very remote poſſibility be centred in one individual with the abſolute command over the capital. I need not refer to a very remote period of Hiſtory to ſhew, how dangerous a tendency that may have. If it be matter for the Legiſlature, it is juſt as competent to the Courts of Juſtice to fix the boundary of Executory Deviſe. If the diſpoſition was ſtrictly according to the rules of law, then only the Legiſlature could interfere on the ground of inconvenience: but this teſtator ſays, by this irregular and permitted mode it is competent to him to tie up property to this extent. It muſt be ſhewn, that the Courts have given ſanction to limitations of this kind. I am not calling for a new limitation of a power antecedently enjoyed: but I call upon the Court to ſtop; alledging, that this latitude never has exiſted. Some preciſe caſe ought to be ſhewn, in which it has prevailed. It is not neceſſary to point out the preciſe limits. It is enough to ſay, this exceeds the utmoſt limits, within which it ought to be permitted. Your Lordſhip will prevent the rule of law from being perverted to a purpoſe, not only foreign, but directly oppoſite, to the purpoſe, for which it was eſtabliſhed.

Favor and disfavor are a ground frequently adopted in this Court: as in the inſtances of creditors and proviſions for children. Upon that ground an eldeſt daughter, and even an eldeſt ſon, has been conſidered as a younger child for the purpoſe of giving effect to that proviſion, which the father intended for all his children. There can hardly be a greater ſtretch. In Lord *Teynham* v. *Webb*, 2 *Veſ.* 210. Lord *Hardwicke* diſtinctly ſtates the ground. It is not applicable to any other caſe than that of parent and child; *Hall* v. *Hewer*, *Amb.* 203. If any opportunity could be found of applying the doctrine of *Cy pres* to this will, it is not entitled to that favor, which the Court is in the habit of adminiſtering to diſpoſitions more natural and meritorious.

Mr. Hargrave.—In former times the Judges had to contend againſt ſchemes to extend entails beyond the uſual time for ſuffering Common Recoveries. Perpetuity of entail aſſumed various forms for that purpoſe. In the reigns of *Elizabeth* and *James* I. the form was a proviſo, that in caſe of any attempt to bar entail by recovery or otherwiſe the eſtate ſhould ceaſe; and how much exertion was required to ſuppreſs this mode of defrauding the law of Common Recoveries appears in Lord *Coke*'s report of the three great caſes of *Corbet* (*a*), *Mildmay* (*b*), and *Portington* (*c*). Another form aſſumed was Executory Deviſe, from its nature not within the reach of either fine or recovery; and to preſcribe a boundary to which, and to foil the attempts to exceed that boundary, the Courts have been almoſt continually reſorted to for about two centuries. Another form was Executory Truſt, directing eſtates for life to unborn children to be ſo conſtituted as to make them tenants for life, and to let in the iſſue to take as purchaſers. That attempt was cruſhed by Lord *Cowper* in *Humberſton* v. *Humberſton* (*d*). Another contrivance was by a power of revocation, to be exerciſed upon the birth of each tenant in tail, and to ſubſtitute ſtrict ſettlement. That was defeated by Lord *Northington* in *The Duke of Marlborough's caſe* (*e*). Theſe were only attempts to create perpetuity of entail.

In this caſe the moſt extravagant accumulation is combined with exceſſive entail. The truſts are not merely in breach of the duty and the profeſſions of the teſtator, as father of a family, not merely vicious in a moral ſenſe, but injurious politically. Truſts conſtituted for ſuch a purpoſe of accumulation are at leaſt of a tendency very dangerous to the public intereſt. The odiouſneſs of the truſts may have great effect. In reſpect of that it may be juſtifiable in the Court to underſtand the reſtrictive words largely; and the Court may feel it their duty to endeavour to diſappoint truſts of ſuch a nature. It cannot however be contended, that the mere odiouſneſs of the truſts will ſuffice to invalidate them. The *Roman Querela teſtamenti inofficioſi* prevailed as the ſettled law in the time of *Juſtinian*, and long before; and the teſtamentary power became circumſcribed in like manner in ſome countries of modern *Europe*. It was ſo in ſome provinces of *France*. But our law agrees with the Twelve Tables; in which according to the extract in *Juſtinian's Digeſt* the language was, "*Uti legaſſit ſuæ rei ita fas eſto.*" The proper ſubject of inquiry

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(*a*) 1 *Co.* 84. (*b*) 6 *Co.* 40. (*c*) 10 *Co.* 35. (*d*) 1 *P. Will.* 332.
(*e*) *Spencer* v. *The Duke of Marlborough*, 5 *Bro. P. C.* 592.

is, whether the truſts militate with any principle, rule, or policy, of the Law of *England;* or whether they are of ſuch a nature as to be unfit for execution by an *Engliſh* Court of Equity, or otherwiſe not to be executed. The prejudice, that this will cannot be got over, has been much aſſiſted by the late certificate of the Court of King's Bench in *Long* v. *Blackall* (*a*).

Firſt, I accuſe the truſts of this will of infringing upon the rule introduced into our law to circumſcribe Executory Deviſes:

Secondly, of being ſo groſsly unmeritorious, inconvenient, againſt public good, and improper, excluſive of the objections from the limits preſcribed to Executory Deviſe, as to juſtify, or rather to require, condemnation:

Thirdly, of being ſo vague, indefinite, obſcure, and uncertain, that they ought to be rejected as unintelligible and impracticable.

Firſt General Head.—Executory deviſes have chiefly ſprung up ſince the Statute of Uſes (*b*), and the Statute of Wills (*c*). Some glimpſe however there is of Executory Deviſe in much earlier times; and it is poſſible, that under the cuſtom of deviſing lands, as it prevailed in *London* and other places, ſomething of the kind might have been occaſionally at leaſt attempted. Accordingly it has been aſſerted by Judges of high authority, that Executory Deviſes determining the fee in one perſon upon a contingency, and raiſing up a fee in another, have always in ſome reſpect prevailed. This aſſertion, which came from the Bench in *Pells* v. *Brown*, as appears by *Croke*'s report, might be true in a ſmall degree under the power of deviſing by cuſtom. In favor of the aſſertion, underſtood with the reſtriction, the Year-Books furniſh ſome little evidence. *Gowdchep's caſe*, 49 *Edw.* 3. *fo.* 16. ſeems to be of that deſcription: the fee till the ſale deſcending to the heir, but afterwards paſſing to the vendee. The caſe put in the Year-Book 11 *Hen.* 6. *fo.* 13. *b.* of a deviſe of lands in *London* under the cuſtom, that the executors ſhould ſell to pay debts, and the caſe put in the ſame Year-Book of a deviſe under the power of deviſing by cuſtom to iſſue *en ventre ſa mere*, are alſo inſtances. But even the induſtry of Lord *Coke*'s time was not ſufficient to glean more than theſe few ſamples of Executory Deviſe of lands

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(*a*) 7 *Term Rep.* B. R. 100; *ante* vol. 3. 485. (*b*) 27 *Hen.* 8. *c.* 10. (*c*) 32 *Hen.* 8. *c.* 1. 34 *Hen.* 8. *c.* 5.

previous to the reign of *Hen.* VIII.; and it may be doubted, whether theſe precedents alone ſhould be deemed ſufficient to prove the law, even as to the power of deviſing by cuſtom. Certainly alſo the undoubted rule of the common law againſt creating a freehold *de futuro*, ſtated in *Barwick's caſe*, 5 *Co.* 94. *b.*, which is ingeniouſly accounted for in the introduction to a manuſcript treatiſe upon remainders by Lord Chief Baron *Gilbert*, in my poſſeſſion, made it impoſſible to create ſuch executory intereſts in the freehold and inheritance of lands by grant or any common law conveyance; and ſo Lord *Coke* obſerves in *Matthew Manning's caſe*, 8 *Co.* 95.

Firſt, as to the inheritance: For many years after the beginning of the ſixteenth century Executory Deviſes of the inheritance were little known and as little ſanctioned. According to the caſe of *The Prior and Convent of Saint Bartholomew Weſt Smithfield*, *Dy.* 33. *a. pl.* 12, the Judges *Fitzherbert* and *Baldwin* held it not allowable to limit a fee upon a fee. In that caſe indeed the contingency for raiſing the ſecondary fee might have happened at any time, however diſtant: but Chief Juſtice *Vaughan* in his report of *Gardner* v. *Sheldon* 271 infers from the former caſe, that the clear opinion of thoſe Judges, whom he ſtyles the greateſt lawyers of the age, was againſt Executory Deviſe, as a thing unknown to our law. However, it may be inferred from *Dy.* 124. *a. pl.* 38. that Executory Deviſes of the inheritance become in ſome degree countenanced in the reign of *Philip* and *Mary;* for ſuch a deviſe upon the contingency of the death of the teſtator's ſon under the age of twenty-four was held not to prevent the deſcent to him, in reſpect that he had attained that age; which rather implies, that, if he had not lived to attain it, the deviſe might have operated. That inheritance ſhould thus begin to be ſubject to Executory Deviſe may be accounted for from the progreſs of uſes and truſts after the *Statute of Uſes* and from the effect produced by the *Statute of Wills*. Springing uſes of the inheritance and freehold furniſhed a precedent for like executory eſtates in the form of Executory Deviſe; and the conſtruction of the power of deviſing under the *Statute* affording the Judges an opportunity of exerciſing a diſcretion in favour of Executory Deviſe accordingly. A farther countenance of Executory Deviſe of inheritance early in the reign of *Elizabeth* may be inferred from *Boulton's caſe*, cited 2 *Rol. Rep.* 217. and *Palm.*

132. *Roll* however obſerves, that there is a difference in the Reports of that caſe; and at all events it was no more than an extrajudicial opinion. During the remainder of that reign Executory Deviſes of the inheritance gained ſome farther ground: *Hinde* v. *Lyon*, 2 *Leon.* 11; 3 *Leon.* 64; 70. *Fulmerſton* v. *Steward*, ſtated *Palm.* 135; *Cro. Jac.* 592. *Wellock* v. *Hammond*, *Cro. Eliz.* 204: but in the firſt of theſe caſes the contingency depended upon a ſingle life: in the ſecond it was almoſt immediate; and in the third it was confined to two years. That Lord *Coke* concurred in ſanctioning ſuch Executory Deviſes appears from *Matthew Manning's Caſe*; for though that was an Executory Deviſe of a term for years, Lord *Coke* argued in ſupport of the limitation over of the term after an eſtate for life from the validity of an Executory Deviſe of a fee. A few years afterwards came *Pells* v. *Brown*; reported fully *Cro. Jac.* 590. *Palm.* 131. 1 *Rol. Rep.* 216; and ſhortly *Godb.* 282. and *Dy.* 354. *a.* in the margin, edit. 1688. This caſe was adjudged in the court of King's Bench ſoon after Lord *Coke*'s removal. It was a deviſe to the younger ſon of the deviſor and his heirs for ever; and if he ſhould die without iſſue, living his elder brother, then to him and his heirs. It was adjudged a good Executory Deviſe by all the Judges of the court of King's Bench; and all of them except *Doderidge* held, that it could not be barred by Common Recovery. *Doderidge* appears to have been in ſome manner influenced by the apprehenſion of having perpetuity revived under the ſhelter of Executory Deviſe. This caſe is generally looked to as the Pole ſtar, or, to uſe the expreſſion of Lord *Kenyon* in *Porter* v. *Bradley*, 3 *Term Rep. B. R.* 143. is deemed the foundation and, as it were, the *Magna Charta* of this branch of our Law. I do not however feel it as furniſhing very much of the code of Executory Deviſe. It is certainly ſilent as to Executory Deviſes of chattels; and it goes but a little way towards aſcertaining the boundary of Executory Deviſes of the inheritance. However, it may be properly ſaid to have fixed, that in reſpect to the Executory Deviſee's having only a poſſibility his intereſt is not within the recompence of a Common Recovery, and therefore is not within the reaſon of its barring; and notwithſtanding the ſubtilty of the reaſoning it has been held ever ſince, that Executory Deviſes cannot be barred by Common Recovery. That caſe alſo aſſiſts in aſcertaining, whether after a

deviſe to one and his heirs limitations over upon failure of heirs ſhould operate by Executory Deviſe or remainder; and it finally fixed the legality of Executory Deviſes of the inheritance upon a contingency not exceeding a life; though I do not obſerve, that the Judges, who differed from *Doderidge*, were very explicit in ſtating, how far they were influenced by the ſhortneſs of the contingency. Chief Baron *Montague* indeed in *The Duke of Norfolk's Caſe*, 3 *Ch. Ca.* 19. almoſt repreſents *Pells* v. *Brown*, as if it was queſtionable; referring to *Gay* v. *Gay*, *Sty.* 258; 274; and to the argument of *Latch*; who in that caſe aſſerts, that after deciding *Pells* v. *Brown* the Court was divided upon the point; that in the *Serjeant's Caſe* 21 *Jac.* it was made a flat query, whether an Executory Deviſe of the freehold is good; that ever ſince it has been diſputable; and that *Pells* v. *Brown* is oppoſed by a ſolemn judgment of the Court of Common Pleas, in a caſe however, which is referred to without any name. Yet neither the Chief Baron nor the two Chief Juſtices in *The Duke of Norfolk's Caſe* ventured abſolutely to deny the legality of Executory Deviſe of inheritance; and Lord *Nottingham* obſerved, that queries for exerciſing the wits of Serjeants were not governing opinions to decide the law by. Upon the whole it may be aſſumed, that from *Pells* v. *Brown* the validity of Executory Deviſe of inheritance, where the contingency does not exceed one life, became unqueſtionable.

From one life the Courts gradually proceeded to ſeveral lives wearing out at the ſame time: what paſſed as to Executory Deviſes and truſts of terms for years aſſiſting this enlargement; and at length the period reached lives in being and twenty-one years afterwards, with allowance of the time of geſtation for a poſthumous child: but this progreſs was not without ſtruggle. In *Snow* v. *Cutler*, 1 *Lev.* 135; *Sir T. Raym.* 162. 1 *Keb.* 752. 800. 851; 2 *Keb.* 11. 145. 296; 1 *Sid.* 153; a deviſe to the heirs of the body of the deviſor's wife, if they ſhould attain the age of fourteen, was warmly conteſted upon the ground of being an Executory Deviſe to a perſon not *in eſſe*, and a contingency upon a contingency; *viz.* the birth of a child, and its attaining fourteen: but I do not obſerve, that the mere circumſtance of fourteen years beyond a life in being was much objected to. It was ſeveral times argued; and ended with the Court's being equally divided: but according to *Levinz* all agreed with *Pells* v. *Brown*, that Executory Deviſe may be for one life; and that it cannot be barred by Recovery.

Thus the doctrine reſted till *Taylor* v. *Bydall*, 2 *Mod.* 289; *Freem.* 243; *Cart.* 182. It appears from the account of the Record in Mr. *Foreſter's Reports* 232. to have been adjudged in the court of Common Pleas in *Hilary* Term 29th and 30th *Char.* II. It was conſidered by the Court of King's Bench, while Lord *Hardwicke* was Chief Juſtice, as a clear adjudication for extending the contingency of Executory Deviſe of inheritance to twenty-one years beyond lives in being: but it was a deciſion, while Lord *North* was Chief Juſtice; and he concurred in it; and I know not how entirely to reconcile it with the ſtrong part, he took in *The Duke of Norfolk's Caſe*, except upon the ſuppoſition, that diſtinctions between the inheritance and terms for years were relied on in a great degree. Even the extenſion of one year beyond co-exiſting lives was conteſted ſoon after the Revolution; and in the firſt inſtance with ſucceſs. In *Lloyd* v. *Carew*, *Pre. Ch.* 72; *Show. P. C.* 137; the Court aſſiſted by the Chief Juſtice of the court of Common Pleas and Judge *Rookſby* diſmiſſed the bill; as it ſeems, becauſe the contingency was too remote: but the decree was reverſed upon appeal to the Houſe of Lords. Yet ſoon afterwards, 9 *Will.* III. in *Luddington* v. *Kime*, 1 *Lord Raym.* 203; 1 *Salk.* 224; and various other books, it was contended in the court of Common Pleas, that the contingency for Executory Deviſe of inheritance could not be extended beyond a life in being, even for a poſthumous child. There was no deciſion upon that point; the whole Court holding the limitation a contingent remainder in fee. However Lord Chief Juſtice *Treby* and Mr. Juſtice *Powell* declared themſelves upon the point: the latter holding, that for ſo ſhort a time as the birth of a poſthumous child a life in being might be exceeded: the former proteſting againſt going beyond the life of one perſon in being, and relying upon what paſſed in *Snow* v. *Cutler*.

The ſubject of Executory Deviſes was treated with a fullneſs and particularity, even exceeding the diſcuſſion in *The Duke of Norfolk's Caſe*, in *Scattergood* v. *Edge*, 2 *Salk.* 229; 12 *Mod.* 278; and in the ſupplement to the edition of 11 *Mod.* publiſhed in 1781 from a manuſcript of *Lutwyche*, which includes the Record,

and

1798.

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and contains far the largeſt Report. It was a caſe of a very mixed and complicated nature; and, ſo far as it concerns the hiſtory of Executory Deviſe of inheritance, the chief thing to be collected from it is, that notwithſtanding ſome of the prior caſes the Judges conſidered lives in being as the ultimatum of the contingency in point of remoteneſs. As lately as 1722 it was ſtrongly argued, that this time ſhould not be exceeded, even to include a child *en ventre ſa mere*; and therefore that an Executory Deviſe of inheritance to the ſon of one, who was a bachelor, was too remote. It was ſo argued in *Gore* v. *Gore*, 2 *W. Kel.* 254 (*a*) and *Peere Williams* in the report of his own argument inſiſts upon that among other points (*b*); and according to 2 *Str.* 958. the firſt certificate of the Court of King's Bench in 1722 was againſt the Executory Deviſe upon that very ground. But the ſecond certificate by Lord *Hardwicke* and the other Judges was in favor of it; and the firſt certificate was according to 9 *Mod.* founded upon the precedent term of 500 years. Yet ſtill it was doubted, whether the addition of twenty-one years to lives in being ſhould be allowed. At length however a complete judgment for twenty-one years with the allowance of the proper time for the birth of a poſthumous child was obtained; but not till the year 1736, in *Stephens* v. *Stephens*, 2 *Barnard* 375; 2 *W. Kel.* 168; and ſtated in *Foreſter* 228 with a copy of the certificate by Lord *Hardwicke* and the other Judges; which is expreſſed with great care and explicitneſs. Ever ſince that deciſion Executory Deviſe of inheritance to the extent of that period has been allowed without the leaſt controverſy; as it ſeems, upon an underſtanding, that the boundary of Executory Deviſe is univerſally the ſame; that is, for inheritance as for terms for years and chattels perſonal. Accordingly Lord *Kenyon* in *Long* v. *Blackall*, a caſe upon a term for years, ſo ſtates the limits for Executory Deviſe generally. Nor is your Lordſhip in ſending that caſe to the Court of King's Bench to be conſidered as having a doubt, whether the boundary of Executory Deviſe was eſtabliſhed to the extent, I have juſt ſtated. In deſiring the opinion of a Court of Law your Lordſhip had a very different object in view; though from the manner, in which the caſe was treated in the court of King's Bench both by the Court and the Counſel, it ſeems, as if that object was not perceived. From the circumſtances of that Executory Deviſe its validity could not be

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(*a*) 9 *Mod.* 4. 10 *Mod.* 501. 2 *Barnard.* 209; 229; 358. 2 *Str.* 958. 2 *Eq. Ca. Ab.* 339. *pl.* 12.

(*b*) 2 *P. Wms.* 36, 37.

ſupported without the allowance of the time for the birth of a poſthumous child twice over. I apprehend, the objection, as far as there was any, to have been, that it began with a Deviſe to a poſthumous child for his life; and a limitation over upon failure of heirs male of his body at his death was ingrafted upon that; which of courſe would include an heir male then *en ventre ſa mere*. Therefore as the Deviſe began with the allowance for the birth of a poſthumous child and alſo might conclude with it, that time might be claimed twice over; and ſo the nine or ten months allowed for the birth of a poſthumous child after lives in being and twenty-one years might be enlarged to eighteen or twenty months. That, I preſume, was the nicety, upon which your Lordſhip intended to have the opinion of the court of King's Bench: but from the turn, the caſe took, it ſeems at leaſt doubtful, whether the point ought to be conſidered as fully adjudged.

As to Terms for Years, the older caſes are expreſs againſt deviſing over a Term after a Deviſe of it for life. The caſe 6 *Edw.* 6. *Dy.* 74. is an expreſs judgment to that effect; and there Lord Chief Juſtice *Montague* and Judge *Hales* ſtate the point to have been ſo ruled by all the Judges, while Lord *Rich*, who had recently reſigned the Great Seal, was Lord Chancellor. Indeed in *Dyer* 7. *a.* there is a caſe 28 *Hen.* 8. in which Judge *Englefield* thought a Deviſe over of a term even after the Deviſe to one and the heirs of his body allowable: but he was overruled by the Judges *Baldwin* and *Shelly*; who ſaid, it was as contrary to Law to limit a Term in remainder as to limit ſuch a remainder of a perſonal chattel. *Baldwin* however rather appears to admit, that the Executory Deviſe would have been good, if the firſt deviſe had been for life: but that was extra-judicial, and contrary to the caſe 6 *Edw.* 6. However, the reaſons againſt deviſing over a Term after an eſtate for life were very artificial; viz. the ſmall conſideration of a Term, and the now exploded notion, that our Law does not admit a poſſibility upon a poſſibility. In the reign of *Elizabeth* the Judges under a nice diſtinction between deviſing a Term itſelf and deviſing only the uſe of it relaxed from this ſtrictneſs as to a Term, where the deviſe over was after an eſtate for life: *Dy.* 277. b. *Weltden* v. *Elkington*, *Dy.* 358; *Plow.* 519. *Paramour* v. *Yardley*, *Plow.* 539. But an Executory Deviſe of a term was not conſidered quite ſafe againſt ſale by an Executor or Adminiſtrator under colour, that there were not aſſets to pay debts; and *Handall* v. *Newman*, *Mo.* 748 proves, that ſuch danger was not imaginary. This danger, which muſt ever belong to a Deviſe of a Term for Years, with ſome doubt, that ſtill prevailed, as to the ſufficiency of the latter authorities to overrule the old doctrine, again carried Executory Deviſes of Terms into Chancery to obtain as well ſecurity againſt alienation of the Term as the ſhelter of *Truſt*; and there relief was given accordingly; *Cole* v. *Moore*, 5 *Ja. Mo.* 806. About the ſame time the Courts of Common Law became leſs ſubtle and more firm in ſupporting the Executory Deviſe of a Term; for in *Matthew Manning's caſe* it was in vain inſiſted, that the Termor could not in his life grant his Term over to one for life; remainder to another; and therefore could not ſo deviſe; and Lord *Coke* and four other Judges reſolved in favour of the Executory Deviſe; and alſo overruled the diſtinction between deviſing a Term for Years and deviſing the uſe of a Term. *Lampet's caſe*, 10 *Co.* 46. gave new ſtrength to the deciſion in *Manning's caſe*: but ſtill the Judges were ſo jealous of and averſe from Executory Deviſes, that Lord *Coke* was ſcarcely removed from the King's Bench, before the controverſy as to Terms for Years in a manner revived: *Child* v. *Bailey*, *W. Jon.* 15. 2 *Rol. Rep. Palm.* 48, 333. *Cro. Ja.* 459. According to *Jones* ten Judges againſt two condemned an Executory Deviſe of a Term to one ſon, with a limitation over to another ſon, if the former died without iſſue in the life of the latter. An abſolute revocation of *Manning's caſe* and *Lampet's caſe* was not avowed by the ten Judges: but they openly declared againſt going a ſtep farther; and it was relied on, that the Deviſe in *Child* v. *Bailey* was equivalent to a Deviſe to one and the heirs of his body with a limitation over; and therefore differed from thoſe caſes. Indeed in that point of view, though the confining the contingency of the limitation over to a failure of iſſue during a life in being, and the circumſtance, that there was no expreſs Deviſe of the Term to the heirs of the body of the firſt Deviſee, furniſhed a ſtrong anſwer to the objection, that it was a Deviſe over of a term after an eſtate given to the firſt Deviſee and his iſſue, yet a colour of reaſon was not wanting to ſupport the deciſion in *Child* v. *Bailey*; for an unqualified Executory Deviſe of a term after a deviſe to one and the heirs of his body is upon the contingency of a general failure of iſſue; and ſo leads to a palpable perpetuity; and as the Judges, however erroneouſly, conſidered the caſe, that Deviſe was conſtructively equivalent. In that point of view alſo, that is, as a Deviſe of a Term after a prior Deviſe to one and the heirs of his body, *Child* v. *Bailey* was a proper reprobation of the Executory Deviſe of a Term. There are many early caſes to the ſame effect: at Law, *Sanders* v. *Corniſh*, *Leventhorp* v. *Aſhby*, *Cro. Char.* 230; 1 *Roll. Abr.* 611. *W. Jon.* 15. After the Reſtoration the illegality of limiting Terms or truſts of them after an eſtate tail or a general failure of iſſue was ſeveral times confirmed; *Apprice* v. *Flower*, *Pol.* 27, 1 *Ch. Rep.* 175, and *Lord Nottingham's Manuſcript Prolegomena of Equity*; *Pearſe* v. *Reeve*, *Pol.* 29., and the ſame *Manuſcript*; *Backhouſe* v. *Bellingham*, *Pol.* 33., and the ſame *Manuſcript*; *Burges* v. *Burges*, *Pol.* 40, 1 *Mod.* 114. *Rep. Temp. Finch* 91, 1 *Ch. Ca.* 229, and *Lord Nottingham's Manuſcript Reports*, and his *Manuſcript Prolegomena*; *Love* v. *Windham*, 2 *Keb.* 637. 1 *Vent.* 79, *Knight* v. *Knight*, 1 *Mod.* 50, 1 *Lev.* 290, *Pol.* 42, 1 *Sid.* 450, and both the *Manuſcripts* laſt mentioned; *Warman* v. *Seaman*, *Pol.* 112, and the ſame two *Manuſcripts*; and *Oſgood* v. *Oſgood*, in *Lord Nottingham's Manuſcript Prolegomena*, and there only. It is obſervable upon the certificate in *Pearſe* v. *Reeve*, which is ſtated at length in *Pollexfen* 30, the three Judges, who certified to Lord *Clarendon*, were not ſatisfied with declaring the limitation over of the truſt of the Term after failure of heirs of the body, or of iſſue, underſtood in the ſame large ſenſe, void; but in ſome degree they revived the old objection, that it was a poſſibility upon a poſſibility; the huſband and wife, to whom the Term was firſt limited, not having had any child *in eſſe* at the creation of the truſt; and they actually ſtated ſuch a double poſſibility to be againſt Law. It is alſo obſervable, that, though they allow, that it is not fit to call in queſtion the judgment in *Manning's caſe*, yet they declared, they did not think it ſafe to ſtretch the Law againſt its ordinary rules farther than that caſe had done. This appeared like reverting to the doctrine confining the Deviſe over of a Term to one life, and requiring that life to be *in eſſe*. Even the caſe of *Warman* v. *Seaman*, in which Lord *Nottingham* himſelf held the limitation over void, if not carefully attended to, may ſeem to favor the ſame notion; for the limitation was to children, and not to iſſue (*a*); but Lord *Nottingham*'s own account of it ſhews, that in the firſt opinion, he gave, he conſidered the word "*Children*" in the ſtrict ſenſe; and that in the final deciſion he acquieſced in the opinion of all the Judges partly upon the conſideration of underſtanding the word "*Children*" as equivalent under all the circumſtances of the caſe to "*heirs of the*

(*a*) The printed reports are otherwiſe. See *Finch* 279. *Pol.* 112. 2 *Ch. Ca.* 209.

body." Therefore he only meant to concede, that a limitation over of the truſt of a Term without any qualification after an intereſt in the nature of an eſtate tail could not be ſupported; a doctrine, he never appears to have denied, and which he expreſsly approves, both in his *Prolegomena* and in his judgment in *The Duke of Norfolk's caſe*.

But where a Deviſe over of a Term was only after an eſtate for life, it was more than adjudged good ſoon after the Reſtoration. The doctrine was extended a little farther; for a limitation over of the truſt of a Term was allowed after two co-exiſting lives. This was decreed by Lord *Clarendon* upon the joint opinion of the Chief Juſtices *Forſter* and *Bridgeman*, and of *Hale*, Chief Baron, in *Goring* v. *Bickerſtaffe*, *Pol.* 31. 1 *Ch. Ca.* 4. 2 *Freem.* 163, and in *Lord Bridgman*'s *Manuſcript Reports* of Judgments, while he preſided in the Court of Common Pleas, in four volumes, which I have. The caſe is alſo reported in *Lord Nottingham*'s *Manuſcript Prolegomena.* Lord *Clarendon* upon the rehearing reverſed the former decree. According to Lord *Nottingham*'s Report it was reſolved, "That the limitation of a Term to ſeveral perſons in remainder, one after another, if they be all in being and alive together, is good; and doth in no ſort tend to the perpetuity of a chattel; eſpecially, where each remainder is but for life; and ſo *all the candles are, as it were, lighted together*: but otherwiſe it might be, if a remainder was limited to a perſon not in *eſſe*."

Lord *Bridgman*'s report of the caſe confirms this account; except that he repreſents the opinion as coming from himſelf and the Chief Baron, and Lord Chief Juſtice *Forſter* as only not gainſaying it. The phraſe, that "*the candles are all lighted at once*," which has been current ever ſince, Lord *Bridgman* gives as Lord *Hale*'s words.

But even this adjudication, ſo extending the Executory Deviſe of a Term from one to ſeveral lives, did not quite ſettle the matter as to Terms for Years. On the contrary in the latter end of the reign of *Charles* II. the controverſy was revived with great heat in *The Duke of Norfolk's caſe*, ſometimes called *The Caſe of Perpetuities*, 3 *Ch. Ca.* 1; 2 *Ch. Rep.* 229; 2 *Freem.* 72, 80; *Pol.* 223; and Lord *Nottingham* in his *Manuſcript Chancery Re-*

ports gives his own argument upon delivering his judgment in favour of the truſt, after hearing the opinions of the two Chief Juſtices and the Chief Baron againſt it. The great ſtrength of the caſe agianſt the truſt was, that the truſt to attend the inheritance, while Lord *Maltravers* or any of his iſſue male was living, might be deemed equivalent to a limitation in truſt for him in tail male; and ſo it might be conſidered as a limitation over after a veſted remainder in tail male; and therefore after a failure of iſſue generally. Had the Judges been content with that mode of reaſoning, Lord *Nottingham* would have had leſs opportunity of objecting the fallacy of their reaſoning; and in that conſideration of the caſe various authorities, and particularly *Child* v. *Bailey*, upon which the Judges greatly relied, ſeemed to preſs hard againſt the Lord Chancellor. But the Judges took a larger ſcope. From their diſlike of the doctrine of Executory Deviſe and their zeal to ſtop its progreſs they declaimed at large againſt Executory Deviſes, as leading to perpetuities; and though they did not abſolutely deny the legality of Executory Deviſes of inheritance, yet they inſiſted upon ſome grounds, which ſeemed to amount to excluding their influence over terms for years, and conſequently tended to impeach the caſes of *Manning* and *Lampet*; and to revive the doctrine, which thoſe caſes had in a great meaſure exploded. This gave great advantage to Lord *Nottingham*; and he availed himſelf of it. On the one hand he treated the caſe as in effect only an Executory Truſt of a Term upon the contingency of a life in being; that is, the death of Lord *Maltravers* without leaving iſſue in the life-time of his brother, the duke; and ſo, as if the previous truſt of attendance upon the eſtate tail of Lord *Maltravers* was no material part of the caſe, he did not dwell upon it; for, excluſive of his particular obſervations againſt *Child* v. *Bayley*, which was mainly relied on againſt him, he ſcarce more than hinted, that Lord *Maltravers*'s inſanity delivered the caſe from the objection of a previous eſtate tail. On the other hand, in every other branch of the argument, viz. in anſwering all other objections to the truſt of the term, ſuch as, the exility of eſtate, the double contingency, the ſuppoſition of perpetuity, when clearly the contingency was only the ſingle life of Lord *Maltravers* and time for the birth of a poſthumous ſon to him, and the appearance of danger on that account, he was full and convincing: he argued like a man, who clearly ſaw the weakneſs of the grounds, to which his opponents had reſorted; and ſaw

alſo,

alſo, that, independent of the objection from the reſemblance of the previous truſt of attendance upon a veſted remainder in tail male to ſuch a previous remainder itſelf, which, I conceive however, was the real pinch of the caſe, both the reaſon of the thing and the ſtrength of the authorities were with him. Accordingly in *June* 1682 he made a decree ſuſtaining the truſts of the term. After his death in *November* following upon a Bill of review that decree was reverſed by Lord *North*, then Lord Keeper; but upon an appeal to the Houſe of Lords the decree of Lord *North* was reverſed, and that of Lord *Nottingham* affirmed, in *June* 1685; Lord *Jefferies* being underſtood to have acceded to Lord *Nottingham*'s opinion, and to have been active in ſupporting it.

Thus the point as to Terms for Years was conſidered as cloſed; for the principle of the decree was, that they were equally ſubject with inheritance to Executory Deviſe and to truſts of the ſame nature. It was alſo thought to be within the principle of the decree, that ſo long as a ſtrict ſettlement of any ſpecies of property by Executory Deviſe or by truſts of the ſame nature did not exceed the ordinary time for barring a regular intail by eſtates for life with remainder in tail to an unborn child, which is, when ſuch child ſhould attain the age of twenty-one, it would be conſidered as allowable.

This led to the general practice of ſettling Terms for Years, and of providing portions for children under the truſts of ſuch terms, to the extent of lives in being and twenty-one years afterwards; and at length ſuch practice was made the chief ground, while Lord *Hardwicke* preſided in the court of King's Bench, of extending Executory Deviſe of inheritance in the ſame manner; the practice as to terms for years thus aſſiſting the extenſion of Executory Deviſe of inheritance, as the precedents of Executory Deviſe of inheritance had before aſſiſted to eſtabliſh Executory Deviſe of Terms for Years.

But Lord *Nottingham* foreſaw the poſſibility of future abuſe of Executory Deviſe; and having ſupported it to a certain extent by an exerciſe of judicial diſcretion, upon the principle of convenience, he took care in his eloquent judgment to have it well underſtood, that a right was reſerved to the Courts by a like exerciſe of judicial diſcretion to prevent inconvenience. His language

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language upon this topic is of importance to be remembered; eſpecially in this caſe; which in ſome views of it may very much depend upon an exerciſe of the power of control thus reſerved. As the manuſcript of Lord *Nottingham*'s own Reports ſtates his words, they are as follows:

"It has been urged at the bar, where will you ſtop, if you "do not ſtop at *Child* and *Bayley*'s *caſe?* I anſwer, I will ſtop "every where, when any inconvenience appears, no where, before. "It is not yet reſolved, what are the utmoſt bounds of limiting a "contingent fee upon a fee; and it is not neceſſary to declare "what are the utmoſt bounds to a ſpringing truſt of a Term. "Whenſoever the bounds of reaſon or convenience are exceeded, "the law will quickly be known."

As to Executory Deviſes of chattels perſonal, the controverſy in ſome degree continued even after the cloſe of the diſpute with reſpect to Terms for Years. The doctrine of ancient times made a ſubtle diſtinction between deviſing the chattel itſelf and deviſing the uſe or occupation of it. If the gift or Deviſe was of the chattel itſelf only for an hour, it operated for ever; and wholly paſſed the property; ſo that the donee or legatee might give, ſell, or diſpoſe of, it; and any limitation over was void: but if the Deviſe was of the uſe or occupation of a chattel to one for life, and upon his death to another, the executor aſſenting to the legacy, it was ſaid, that the firſt taker had only ſuch uſe and occupation; and after his death the other had the property. This diſtinction is ſtated by *Brooke*, *Abr.* tit. *Deviſe*, *pl.* 13; and he repreſents it as agreed in the time of *Henry* VIII. and *Edward* VI. to be good law; and refers to the *Year Book*, 37 *Hen.* 6. 30. How the diſtinction was overruled as to chattels real has been ſtated: but it ſeems to have ſurvived ſome time longer as to chattels perſonal. In *Hyde* v. *Parratt*, 1 *P. Wms.* 1. 2 *Vern.* 331. Baron *Powell* ſitting for Lord *Somers* treated the point ſo ſeriouſly as to reſerve it for his Lordſhip. Lord *Somers* even took time to conſider it; but at length held the Deviſe over good; and from that time it ſeems to have been treated as fully ſettled, that perſonal chattels are liable to Executory Deviſe in like manner as chattels real. In that way Lord *Macclesfield* in *Tiſſen* v. *Tiſſen*, and *Upwell* v. *Halſey*, 1 *P. Wms.* 500. 651, ſeems to advert to the doctrine as not longer queſtionable. Accordingly alſo in *Sabbarton* v. *Sabbarton*, *For.* 250. *And.* 335. which Lord *Talbot* ſent to the

Court of King's Bench upon a mixed Deviſe of inheritance and of ſtock, and which therefore left an opening for doubt, whether the latter ſhould not follow the intail of the former, the caſe, as appears from the report of it in *Andrews*, was argued in the Court of King's Bench as an Executory Deviſe depending upon the extent of the rule as to truſt of a Term for Years.

The firſt inference from this hiſtory of Executory Deviſe is, that it appears to be, not a genuine, antient, branch of our law, but an indulged ſuperinduction to it; not a regular production of our general ſyſtem, but an excreſcence; not a ſtrictly regular ſpecies of intail, but a permitted, irregular, mode of ſettlement; not a legitimate offspring of our Common Law, but a privilege gradually inſinuated into our Juriſprudence. It operates by creating future eſtates and intereſts of every kind, freehold as well as chattels, in a way not endured by our Common Law, inconſiſtent with the ſolemnity of its forms, and which without the rules, the Courts have by an exerciſe of diſcretion introduced to circumſcribe this mode of creating eſtates, would have afforded an opportunity of making inheritance and freehold almoſt ever uncertain and precarious, and of making property almoſt eternally unalienable. The rule againſt creating a freehold *de futuro* makes it impoſſible ſo to create a freehold by any common law conveyance; and as to any leſs eſtate, Terms for Years were antiently rather contracts than eſtates; and even now future intereſts cannot be created in chattels real and perſonal except through the medium of Executory Deviſe and truſts. Executory Deviſe is ſtill ſo far conſidered as a privilege, and ſo much diſfavor is ſtill ſhewn to it, that a rule has prevailed ever ſince its introduction againſt conſtruing any eſtate as operating by Executory Deviſe, where it can take effect by remainder. This rule is particularly mentioned by Lord *Hale* in *Purefoy* v. *Rogers*, 2 *Saun.* 388, and has been ſince acted upon in a variety of caſes, of which ſome of the principles are enumerated in the beginning of *Fearn's Executory Deviſes*. Even Lord *Manſfield*, who was not indiſpoſed to emancipate the conſtruction of wills from every thing like technical reſtraint, confeſſed in *Goodtitle* v. *Billington*, *Dougl.* 729, that ſuch clearly was the rule; and Lord *Kenyon* in *Doe* v. *Morgan*, 3 *Term Rep. B. R.* 763. goes the length of ſaying, that if ever there exiſted a rule concerning Executory Deviſes, which has uniformly prevailed without exception, it is that, which Lord *Hale* lays down againſt reſorting to Executory Deviſe, where remainder can operate. Executory Deviſe is upon the whole an irregular ſpecies of entail, little countenanced till ſome years after the reign of *Henry* VIII., and not thoroughly fixed even for inheritance till *Pells* v. *Brown* in the 17th year of *James* I.; and this account does not much differ from what Lord *Kenyon* ſays, 3 *Term Rep. B. R.* 765, that Executory Deviſe was eſtabliſhed in the reign of *Charles* I.

Next, this indulgence originated from an exerciſe of diſcretion by the Judges for the ſake of general convenience. The *Statutes* of *Uſes* and of *Wills* might indeed lead to Executory Deviſes: but the eſtabliſhment of them ſeems to be more properly referable to the Judges themſelves. At the utmoſt theſe *Statute* can only be conſidered as affording a better opportunity of permitting them; for certainly there is nothing in thoſe *Statutes* or any others profeſſing to introduce them, ſtill leſs making any regulation of them. This manner of ſtating the organization of them is exactly Lord *Kenyon*'s notion in *Doe* v. *Morgan*. The ſame notion may be traced in *Scattergood* v. *Edge*, *The Duke of Norfolk's Caſe*, and the caſes, that occurred in the reigns of *James* I. and *Charles* I.

Farther, all the rules, by which Executory Deviſes and limitations and Truſts of the ſame nature are limited, appear to have originated in the diſcretion of the Judges, and to have been from time to time made by them, as occaſion demanded, upon the principle of preventing public inconvenience. Executory Deviſe was not regularly admitted till about two centuries ago. The rules for circumſcribing it are conſequently not of an earlier date: and there are not any *Statutes* for the purpoſe. It is impoſſible therefore, that it can be derived from any other ſource than the diſcretion of the Judges for general utility and public convenience. So, to prevent public inconvenience they limited the time for the contingency; and the Courts of Equity followed the law in this. Hence gradually aroſe the boundary, which now circumſcribes Executory Deviſe and Truſts of the ſame nature.

Farther, this limitation of time for the Contingency was the boundary, which the diſcretion of the Courts eſtabliſhed with regard to the ſpace of time, during which according to the courſe of an ordinary entail of land by eſtates for life with remainders to unborn ſons and daughters in tail inheritances may be kept unalienable; in order to prevent entail by Executory Deviſe going farther than entail by Remainder.

In thus explaining the principle, upon which Courts of Law and Equity have erected a boundary for Executory Deviſe and Truſts of the ſame nature, I only expreſs what many years ago I ſtated upon this ſubject, firſt, by a note in the New Edition of *Coke upon Littleton* (*a*), and ſome years afterwards in my argument in *Wicker* v. *Mitford*, which is in a volume of *Law Tracts*, I publiſhed in 1788 (*b*). Lord *Kenyon* alſo in *Long* v. *Blackall* conſiders the principle of the boundary of Executory Deviſe in the ſame way; and Lord *Mansfield* in a caſe taken from a manuſcript note of Mr. *Francis Filmer* expreſſes himſelf in the ſame manner.

The next inference is, that there is reſerved to the Courts the right of farther exerciſing their diſcretion for the ſame purpoſe, to prevent all material inconvenience from permitting Executory Deviſe; whenever caſes pregnant with any great evil ſhall provoke it. The principle of general convenience and general utility, upon which Executory Deviſe was firſt introduced and ſanctioned, and afterwards limited and controlled, imports, that to employ the permiſſion of Executory Deviſe againſt general convenience and general utility is an abuſe of the permiſſion. It imports alſo, that Executory Deviſe muſt continue ſubject to the control of the Courts: otherwiſe the principle might become dormant, and the Courts would not be adequate to prevent new abuſes; and thoſe only, which have already occurred, would be checked. So Lord *Nottingham*, the great patron of Executory Deviſe, conſidered it in *The Duke of Norfolk's Caſe.* The practice of the Courts from the firſt introduction of Executory Deviſe imports the ſame. The preſent boundary was not the effect of one exerciſe of diſcretion: the limits were from time to time enlarged and contracted, as the caſes and public convenience demanded; and it required above a century in forming. Hitherto the inconvenience, againſt which the Courts have

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(*a*) Co. Lit. 20. *a*, note 5.

(*b*) Hargrave's Law Tracts 518.

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have been called to guard, has been perpetuity of entail, reſtraining alienation: but there may be other inconveniencies of a higher order; *viz.* ſtopping the uſe and enjoyment of property; and there may be at leaſt as great a demand upon the Courts to prevent Executory Deviſes from being made a ſhelter for ſuch abuſes.

One other inference is, that during the progreſs of Executory Deviſe a vaſt jealouſy of its liability to abuſe and a great reluctance to extend its limits have prevailed among ſome of our greateſt Judges and Lawyers. In *Pells* v. *Brown* Judge *Doderidge* inveighed zealouſly againſt Executory Deviſe, as a very dangerous invention, and with the deepeſt learning and acuteneſs endeavoured to ſtop its progreſs by ſubjecting it to Common Recovery. In *Child* v. *Bailey*, only two years afterwards, the ſame Court of King's Bench, that had ſo recently allowed Executory Deviſe of Inheritance, refuſed it *unâ voce* for a term for years; though the contingency was not more reſtrained in the one caſe than the other, and words of inheritance equally followed in both. Upon a Writ of error in the Exchequer-Chamber that judgment was affirmed by Lord *Hobart* and ſix Judges out of ſeven. The manner, in which Sir *Gefrey Palmer* reports the affirmation, *Palm.* 333. ſhews in a ſtriking manner great apprehenſion of ſome vaſt inconvenience. The ſame appears in *Jones*'s Report. They ſeem to have repented going the length of *Manning's Caſe* and *Lampet's Caſe*; obſerving, that they would not extend or give any farther latitude to thoſe caſes, and that time had diſcovered the inconvenience of ſuch limitations. Strong language againſt the extenſion of Executory Deviſe fell from the Judges in ſubſequent times. Lord *Bridgman* in *Grig* v. *Hopkins*, 1 *Sid.* 37. ſeems to doubt, whether, if *Manning's Caſe* was to be adjudged again, ſuch a judgment would be given; adding, that the Judges would not extend their reſolutions more favorably to ſuch deviſes. Language to the ſame effect makes part of the certificate of the three Judges, *Hyde*, *Twiſden* and *Brown*, in *Pearſe* v. *Reeve*. In *Snow* v. *Cutler* Lord Chief Juſtice *Kelynge* and Mr. Juſtice *Windham* according to 2 *Keb.* 11. ſay, they conceived, Executory Deviſe had gone far enough, and it would be dangerous to go farther. Something of a ſimilar tendency is attributed to Mr. Juſtice *Windham* in a farther ſtage of the cauſe; 2 *Keb.* 297. So anxious were the Judges in *The Duke of Norfolk's Caſe* to prevent the extenſion of Executory Deviſes, that they refuſed to terms for years what they could not deny to have been ſettled for inheritance; and even Lord *Nottingham* did not claim more for the former than was allowed to the latter. After the Revolution, in *Scattergood* v. *Edge*, Lord Chief Juſtice *Treby* and Mr. Juſt. *Powell* were loud againſt the extenſion. None, I believe, have avowed being favourable to it. Lord *Hardwicke* himſelf and the three Judges, who joined him in the Certificate finally extending twenty-one years beyond lives in being to the contingency of Executory Deviſe of Inheritance, expreſſed themſelves upon that occaſion, as if they thought, they were bound to diſavow all intention of extending Executory Deviſe. So ſcrupulous was your Lordſhip in *Long* v. *Blackall*, leſt Executory Deviſe ſhould be extended beyond the eſtabliſhed limits, that you would not even decree the allowance of time for a poſthumous child, where the Executory Deviſe began with a child *en ventre ſa mere*, and might have ended in the ſame way, without having firſt the opinion of a Court of Law, whether ſuch double allowance of time for a poſthumous child was allowable: a point, which however ſeems at this moment not to have been fully diſcuſſed, or, if it was diſcuſſed, not fully adjudged.

The firſt general head of imputation againſt the Truſts of this will is, that the beneficial truſts, which the Teſtator appoints to begin, when his previous truſt of accumulation is to ceaſe, are upon a contingency with too much of remoteneſs and latitude for the rule as to Executory Deviſes.

Except in the ſingle inſtance of Mr. *Bradley*'s will, whoſe vain and fanciful production ſhrunk under the inſtant reprobation of Lord *Thurlow*, there was never an example of ſo ſtudied a deſign of experiment upon the latitude of Executory Deviſe, ſuch a deliberate tampering with the Law of Truſt and Executory Deviſe, in order to combine accumulation with Executory Deviſe, to make them commenſurate, and to render both ſubſervient to a protracted excluſion of all uſe of property beyond adding to its own bulk. The teſtator takes ſeven claſſes of lives for the duration of his accumulating project, furniſhing ſix exiſting lives; which, conſidering, that he was in perfect health at the date of his will, and that his three ſons were married, might have been increaſed to a much greater number. After the expiration of all the lives, till convenient purchaſes of land can be found, inſtead of directing, that the intereſt and dividends ſhould be applied, as the rents and profits of the land, if purchaſed, would be applicable, he requires an accumulation of the intereſt and dividends in the ſame manner as the rents and profits of the lands to be purchaſed under the truſt (*a*).

Exceſs of the limits of Executory Deviſe may be imputed to theſe Truſts in ſix different ways:

1ſt, The contingency, till the happening of which the beneficial truſts are prevented from beginning, is partly upon a general failure of iſſue; or at leaſt includes the lives of unborn grandchildren of the Teſtator indefinitely:

2dly, The contingency covertly attempts to add to lives in being the lives of all ſuch iſſue of future ſons of the Teſtator's two younger ſons as ſhall be born at any time within twenty-one years from his deceaſe:

3dly, At leaſt the contingency adds to lives in being the lives of iſſue in the womb at the death of the Teſtator in a way not allowed by the law of Executory Deviſe:

4thly, The contingency includes a double allowance for the caſe of a poſthumous child: *viz.* one expreſsly in the outſet or commencement of the truſt of accumulation, and the other impliedly at the cloſe of it:

5thly, The will nominates lives for the contingency of the beneficial truſts in an extent and in a manner not conſiſtent with the true ſpirit of the rules as to Executory Deviſe:

6thly, The will continues the accumulation, till the lands to be purchaſed with the reſiduary perſonal eſtate ſhall be actually purchaſed;

(*a*) Upon this part of the argument The Lord Chancellor obſerved, that is the caſe of every will, where there is a direction to lay out an accumulating fund of principal and intereſt in land; it is always in this way; that, till the purchaſe can be made, the money is to be accumulated: where an accumulating fund is to be made the ground of purchaſe, the intereſt and dividends, till the purchaſe is made, are never directed to go to the perſon, who would be entitled to the rents and profits of the land to be purchaſed; and it is impoſſible, they ſhould.

purchaſed; whether the lives choſen for poſtponing the commencement of the beneficial truſts are expired, or not.

The firſt of theſe charges depends upon the conſtruction of the reſtrictive words. If they are conſtrued as applying merely to the ſeventh claſs, the four claſſes immediately preceding will be left unqualified and unguarded in point of time; *viz.* the third, fourth, fifth, and ſixth, claſſes; or at leaſt the third. For ſuch teſtamentary diſpoſitions no favorable interpretation is to be expected. The ſtrict rule of conſtruction confines the reſtriction to the ſeventh claſs. The reſtrictive words are not neceſſary to make ſenſe of the preceding, diſtinct, members of the ſentence. It falls therefore exactly within the rule, that words ſhall relate to the laſt antecedent, unleſs the ſenſe is impeded or obſtructed. The rule "*ad proximum antecedentem fiat relatio*" is not merely a rule of grammar, but alſo a rule of legal conſtruction. In the *Year Book* 9 *Hen.* 6. 28. *a.* it is given in argument, as if familiar, and with the proper qualification, "*niſi impediatur ſententia.*" In *Plowd.* 127 Judge *Brown* cites the rule; and Sir *Henry Finch* tranſcribes it in his profound *Diſcourſe upon Law*, 8, and illuſtrates it by caſes from the *Year Books* and *Dyer*. *Noy's Maxims*, 2, and *Wingate's Maxims*, 10, give the rule, and exemplify the application of it in the ſame manner. As to the Inſtances, in which the Courts have acted upon the rule, the caſe of Indictment, 9 *Edw.* 4. 48. *a.*, the caſe of reſtrictive words in a grant of tythes, *Cro. Jam.* 48, the caſe of Covenants in *Littleton's Reports* 80, and the caſe upon the return to a *Mandamus* in the *Reports* in the time of Lord *Holt* 449, are all precedents of the application of it.

2dly, The language of the Will is not ſuch as to afford the opportunity of applying the reſtrictive words to the firſt and ſecond claſſes. As to them, one part of the reſtrictive words is nugatory, and it is not poſſible to apply the other part. Beſides, in the deſcription of the two firſt claſſes there is not any word leading to a connection with the reſtrictive words: the omiſſion of the word "*ſuch*" as to thoſe claſſes amounting to a diſconnection; and though the word "*as*" not only ſatisfies the word "*ſuch*" in the ſucceeding five claſſes, but renders the application of "*ſuch*" to "*as*" a ſecond time, in the reſtrictive words, at leaſt ſomewhat more than the idiom of our language ſeems to admit, yet it gives an opportunity, I confeſs, of connecting the reſtrictive words with the prior claſſes. But the two firſt claſſes being thus diſconnected from the reſtriction lead in ſome degree to the ſuppoſition, that the other four were intended to be excluded alſo.

3dly, There is barely an opportunity of applying the reſtrictive words to the third claſs; and the letter of the will is conſiderably againſt ſuch application, and the ſpirit ſtill more ſo. The deſcription is complete in itſelf; the word "*ſuch*" being ſatisfied by the word "*as*" in the ſame deſcription. At the ſame time I admit, there is a poſſibility of applying the latter word to the former a ſecond time; though not quite according to the idiom of our language without the intermediate conjunction "*and*". If the words of reſtriction immediately followed that claſs, ſuch an application at leaſt approaches to bad *Engliſh*. That however in conſtruing the will would not be the leaſt objection. The objection would be to the propriety, not to the efficacy, of the expreſſion. It muſt have been conceded, that the reſtrictive words might operate as far as they can. Then alſo the rule "*reddendo ſingula ſingulis*" muſt be applied, and the firſt part of the reſtriction muſt be applied to the exiſting ſons of *Peter Iſacc Thelluſſon* at the date of the will, and both parts to his future ſons. But, as this will ſtands, it is quite different. Between the third claſs and the reſtriction there are three other claſſes, each ſo complete as to prevent in point of language all neceſſity of applying the reſtriction to them. Many difficulties are to be overcome: firſt, the preſumption from the rule, "*Ad proximum antecedentem fiat relatio, niſi impediatur ſententia*": then, the difficulty of ſhewing, that the reſtriction ſhould paſs over two of the claſſes, and then attach upon three: then the difficulty from the double contents of the third claſs and the double contents of the reſtrictive clauſe; for it is not poſſible to apply more than one half of the entire reſtrictive words to one half of the third claſs. Therefore it is neceſſary to divide, and apply the rule "*reddendo ſingula ſingulis.*" For that purpoſe very deciſive evidence, that it is demanded by the actual intention, ſhould be extracted from the reſt of the will. But the language of the other parts of the will by no means affords that; and the ſpirit of the whole purpoſe more ſtrongly oppoſes it; and provokes the moſt rigid obſervance of the ſtrict rules of interpretation.

4thly, Even as to the fourth, fifth, and ſixth, claſſes there is not enough to induce a relaxation from the ſtrict rule of referring to the laſt antecedent, and ſo confining the reſtriction to the ſeventh claſs. There are only two diſtinctions in their favor: firſt, that they are nearer to the reſtrictive words than the third claſs; (which is of ſmall conſideration); ſecondly, that all the reſtrictive words may be properly applied to them. But with that allowance the remainder of the argument, that has been uſed with regard to the third claſs, applies to the fourth, fifth, and ſixth claſſes.

The Second Charge of Exceſs of the limits of Executory Deviſe ariſes from the manner, in which the teſtator has expreſſed the latter part of the reſtrictive words added to the ſeventh claſs. If by the words "*born in due time afterwards*" he meant merely to include ſuch iſſue as ſhould be in the womb at his death, the objection does not ariſe. But it is natural, and in diſcourſing upon the ſubject it is quite current, to conſider the twenty-one years after lives in being as the due time; and the queſtion is, whether he did not mean to include the lives of all iſſue of future ſons of his two younger ſons born within twenty-one years after his own deceaſe. If ſo, it is an exceſs of Executory Deviſe; for the rule does not allow the twenty-one years as a time for multiplying lives to extend Executory Deviſe upon. He cannot be ſuppoſed to refer to the birth of iſſue of the future ſons of any of his ſons within due time after his own deceaſe, except with a view to the boundary of Executpry Deviſe, and thereby to give ſome farther extenſion to the truſt of accumulation. It could not be with a view to the birth of a poſthumous child in reſpect of legitimacy; for the reference is to the birth of the children of others. Nor could it be with a view to the benefit of iſſue born to future ſons of any of his ſons in due time after his deceaſe; for the propoſed purpoſe is to exclude ſuch iſſue. The object therefore being to extend the truſt, it was natural for him to look to the twenty-one years. His anxiety was to gain a new ſucceſſion of lives for his truſt. Lives of children in the womb at his death was ſcarce an object. Beſides, if poſthumous children may be made uſe of for the mere purpoſe of extending Executory Deviſe to the life of a child in the womb at the Teſtator's death, which thoſe, who look no farther than the letter and ſurface of Executory Deviſe, may ſuppoſe, but

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which is a latitude, I do not concur in, it was unneceſſary to mention the poſthumous iſſue of future grandſons; and no ſpecial words were requiſite; for where a poſthumous child is admiſſible under an Executory Deviſe, he comes in as a child *in eſſe* by the conſtruction of law. But if the Teſtator meant the twenty-one years, ſpecial words were neceſſary; and it was natural for ſuch Teſtator to have ſuch a purpoſe; and without ſo underſtanding him it is ſcarce to be accounted for, that he ſhould extend his comprehenſion of iſſue born in due time after his death to the iſſue of his future grandchildren; for it was extravagant to ſuppoſe, he ſhould live to ſee his future grandſons married and parents.

I allow, this imputation of exceſs is merely conſtructive; and that in general it might be too much to impute to a teſtator upon grounds, though probable, not deciſive, an illegal intention. On the contrary it is the general office of Judicature to labour to ſave an Executory Deviſe by the moſt favorable conſtruction. But every preſumption ought to be made againſt views of ſuch a tendency as thoſe of this Teſtator.

The Third Charge of Exceſs of the limits ariſes upon the ſuppoſition, that the Teſtator did not mean by iſſue born to the perſons deſcribed in due time after his deceaſe all thoſe, who ſhould come into exiſtence within twenty-one years afterwards, but merely iſſue in the womb at his death. In this ſenſe there are objections both to the nature and extent of his purpoſe. As to the nature of the purpoſe, the addition of the time for the birth of a poſthumous child is only allowable to give effect to a Deviſe in favor of ſuch child, or to ſome other perſon in the event of his being born or not. In general it has been for the ſake of the child himſelf. But the purpoſe, for which this Teſtator comprehends iſſue in the womb at his death, is quite of another kind; *viz.* to exclude the poſthumous child from enjoyment, and alſo to prolong the excluſion of every other perſon, in order to prolong the term of accumulation. This is an abuſe of the extenſion of the contingency of Executory Deviſe as to the time for the birth of a poſthumous child; which was not conceded for ſuch a purpoſe: but in this inſtance as well as in the whole ſyſtem of Executory Deviſe the indulgence was granted in the way of general accommodation for purpoſes of general convenience.

As to the extent of the Teſtator's purpoſe in introducing poſthumous children, the extenſion allowed to the caſe of a poſthumous child proceeds upon the ſuppoſition of only adding nine or ten months after a life in being, as a laſt or farther link to the chain; that is, the time allowed by Law for a woman's going with child after her huſband's deceaſe. To that effect is Lord *Kenyon*'s language in *Long* v. *Blackall*. But this Teſtator not content with the fraction of a year for the birth of a poſthumous child firſt takes that fraction, and then adds the life of the poſthumous child as a new life for prolongation of his truſt of accumulation, and conſequently of his Executory Deviſes. Beſides, unleſs the reſtrictive words are to be conſidered as guarding all ſuch of the ſeven claſſes of lives as require their protection, the truſts muſt fall to the ground. Here therefore we have a right to argue upon the will, as intended to comprehend the poſthumous children of all the various perſons deſcribed in the third and the four following claſſes of lives; which tends wonderfully to multiply the lives through the medium of poſthumous iſſue; and the time would be extended into an allowance of the lives of ſix exiſting perſons and of an indefinite number of perſons not exiſting, but who might poſſibly have been born and have had iſſue in the womb at the death of the Teſtator.

The Fourth Charge of Exceſs is cloſely connected with the third. The Teſtator begins with taking the nine or ten months, with reference to the lives, not of one or two, but of ſix exiſting perſons, and an indefinite number of additional perſons, who might poſſibly have been born and have had iſſue between the date of the Will and the death of the Teſtator; and that, with a view to gain a new ſucceſſion of lives for protracting the truſt of accumulation. He does not indeed expreſsly claim the benefit of the nine or ten months for the birth of poſthumous iſſue after the determination of the laſt life: but it is the ſame as if he had. No language from him was neceſſary to let in poſthumous iſſue, being male deſcendants of his three ſons, at the expiration of his truſt of accumulation. The rule in favour of poſthumous children operates of courſe to let in children *en ventre ſa mere*, if there is no other child to take. Lord *Thurlow* in *Clarke* v. *Blake*, 2 *Bro. C. C.* 320. ſo conſidered it; though there were other children; and the queſtion was only, whether the poſthumous child ſhould take with them; and though the bequeſt was to children living at the death of their father. Lord *Kenyon*'s opinion in *Cooper* v. *Forbes*, 2 *Bro. C. C.* 63. is not to the contrary; for the words were ſpecial. Beſides that, it ſeems now to be ſettled by *Doe* v. *Clark*, 2 *H. Black.* 399., that a child *en ventre ſa mere*, when born, ſhall be permitted to ſhare with children living, when the deviſe takes effect (*a*).

In *Goodman* v. *Goodright* (*b*), which is much diſcuſſed in *Doe* v. *Fonnereau*, *Dougl.* 470. and in *Fearne's Executory Deviſes*, according to a manuſcript note of Mr. *Francis Filmer*, Sir *Fletcher Norton* arguing againſt the will obſerved, that it was going farther than *Stephens* v. *Stephens*; and that in that caſe Executory Deviſe was extended to the utmoſt. Lord *Mansfield* ſaid, that point was well ſettled; that a life in being and twenty-one years afterwards is the utmoſt extent for an Executory Deviſe, and is no more than the Common Law allows in legal limitations; which reſtrain the heir from aliening till twenty one.

This is ſtrong againſt extending the nine or ten months to eighteen or twenty.

Suppoſing this to be the naked caſe of an Executory Deviſe beginning with a poſthumous child and ending with one alſo, I conceive the point to be fairly open to argument notwithſtanding *Long* v. *Blackall*. I ſhall be told, the Certificate in that caſe ſanctions this Will in taking the whole life of the poſthumous child and in taking the time of geſtation twice; and I agree, that in reſpect of its having been ſent by your Lordſhip to the Court of King's Bench for the purpoſe of having this ſort of point determined, and in reſpect of the decree, that appears (*ante*, vol. 3. 495.) to have been made in conſequence of the opinion certified by that Court, it does ſeem an adjudication in favor of it: but that caſe is open to a variety of moſt ſerious objections; and I feel it my duty to controvert both the deciſion itſelf and the application of it to this Will. With regard to the deciſion itſelf, I am not convinced, that the point as to the legality of taking the allowance of time for the birth of a poſthumous child twice, at the beginning and end of the Executory Deviſe, received a full and complete deciſion in the Court of King's Bench; or if it did, that the deciſion agrees with the real

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(*a*) See the Decree upon the Equity reſerved, *ante*, vol. 2. 673.

(*b*) 2 *Burr.* 873.

real meaning of the rule of Executory Deviſe. Certainly the caſe was ſent to the Court of King's Bench with a view to try that point, (the caſe being ſuch as fully to require the conſideration of it) and from the objection, your Lordſhip ſaw to the remoteneſs of the ultimate limitation, in reſpect of the intervening life of the poſthumous ſon. The reſult was a Certificate in favor of the Executory Deviſe; in conſequence of which your Lordſhip found it neceſſary to decide the ſecond queſtion. If the point was determined, the effect is to increaſe the allowance of nine or ten months beyond a life in being to eighteen or twenty months; and to try that very point was the real object in ſending the caſe to the Court of King's Bench: but it ſeems as if the effect of beginning an Executory Deviſe with the life of a perſon in the womb had eſcaped attention, which is not only doubling the allowance of nine or ten months for the birth of a poſthumous child by expreſsly taking that time at the beginning of the contingency, which is by conſtruction allowed at the cloſe of it, but is liable to the objection of adding the life of the child in the womb to the life of the exiſting perſon. So far was Lord *Kenyon* in giving his opinion from conſidering himſelf as giving the allowance of nine or ten months for a poſthumous child twice, that he concludes with ſtating it to be the eſtabliſhed rule to limit Executory Deviſe to a life or lives in being and twenty-one years and a fraction of another year, allowing for the time of geſtation.

With regard to the effect of that caſe, if it is to be conſidered as an adjudication reaching the whole length of the point, upon which your Lordſhip meant to be adviſed by a Court of Law, if it is to be conſidered as any thing more than a deciſion affirming the allowance of the legal time for birth of a poſthumous child beyond a life or lives in being, there are great objections to it. It was argued only on one ſide: the Court, after hearing the argument in favour of the Executory Deviſe having ſo declared in favor of it, without hearing what could be ſaid on the other ſide, as to induce the counſel againſt the Executory Deviſe to decline the argument, under the impreſſion, that he ſhould not be able to change that opinion.

The firſt objection to the caſe, ſuppoſing it to decide the point, is, that it adds nine or ten months to the boundary of Executory Deviſe:

Secondly, in this reſpect the deciſion exceeds the very line, it profeſſes to adhere to: Lord *Kenyon* expreſsly ſtating the rule with an allowance of only a fraction of a year beyond lives in being and twenty-one years:

Thirdly, the deciſion has the effect of taking the life of a perſon *en ventre ſa mere* for a life in being.

This leads to a vaſt extenſion of the limits of Executory Deviſe. If lives in being may be taken for the contingency of Executory Deviſe, if lives of children in the womb are to be conſidered as lives in being, are to be taken for the ſame purpoſe, and if twenty-one years are to be allowed beyond both, the boundary becomes in effect extended to a generation beyond lives in being. Such an interpretation is not conformable either to the authorities, by which the rule was fixed, or to the reaſon of the rule. In *Humberſton* v. *Humberſton*, 1 *P. Wms.* 332. not a hint was thrown out of an exception of children in the womb. The authorities in general mention lives in being, and twenty-one years with a fraction of a year as the *ne plus ultra* of Executory Deviſe. Upon the reaſon of the rule, the boundary is conſtituted by analogy to the entail of inheritance. For that purpoſe the endeavour has been to make the two modes of entail correſpond in this reſpect, ſo far as the difference between an entail, that may be barred by Common Recovery, and an entail, that cannot be ſo barred, will allow. But if lives of children in the womb may be introduced between lives in being and the twenty-one years afterwards to enlarge the boundary of Executory Deviſe, if the Fiction of the *Roman* Law, conſidering children in the womb as living perſons, a fiction invented, and adopted by our Law, for the benefit of ſuch children, and to enable them to take legacies and deviſes, is to be applied to accompliſh ſuch enlargement, and thus to be converted againſt both them and others into an inſtrument of extending Executory Deviſe by adding a new link to the chain, the boaſted analogy between ſtrict legal entail by eſtates for life with remainders over and the irregular but permitted entail by Executory Deviſe will be deſtroyed; and entail by Executory Deviſe will continue property unalienable for a longer time than can be effected by entail through the medium of Remainders. In the latter way the ultimate point, to which the power of barring by Common Recovery can be poſtponed, is twenty-one years after the death of the tenant for life, including the fraction of a year for the birth of his poſthumous iſſue: in the former, if the Executory Deviſe is ſo conſtituted as to keep the Executory Deviſee uncertain till the moment he is to take, as in fact is done by this will, the entail will continue incapable of being barred during lives in being and twenty-one years and the fraction of a year, and alſo during the whole life of the poſthumous child beſides.

Fourthly, ſo letting in the lives of children in the womb in addition to the lives of perſons in being and the twenty-one years afterwards, and ſo protracting the contingency of Executory Deviſe beyond the lateſt time endured for poſtponing the power of barring by Common Recovery, are inconſiſtent with the rule, Lord *Kenyon* himſelf lays down in *Long* v. *Blackall*; that the rules reſpecting Executory Deviſes have conformed to the rules laid down in the conſtruction of legal limitations; and the Courts have ſaid, that eſtates ſhall not be unalienable by Executory Deviſe for a longer time than is allowed by the limitations of a Common Law Conveyance. But this conſtruction will make property unalienable by Executory Deviſe longer than can be done by the regular form of entail to the full extent of the difference between the poſthumous child's attaining the age of twenty-one and the whole of his life. In this view *Long* v. *Blackall*, if it is to be deemed as ſanctioning the allowance of time for a poſthumous child twice, is not merely an extenſion of the limits of Executory Deviſe, but is one of a moſt dangerous kind; not only adding a new fraction of a year, but by neceſſary conſequence adding the whole life of the poſthumous child, and ſo fundamentally ſubverting the analogy to entail in the common form of legal ſettlement, and granting much more of certain duration to the irregular and barely permitted mode of entail than to the regular and ſtrictly legal mode.

But though that caſe ſhould be deemed the moſt concluſive precedent for allowing time for the birth of a poſthumous child twice, it will not reach this will; for there it was to give effect to an Executory Deviſe including a ſeries of proviſions for children and their iſſue; a purpoſe laudable and meritorious; on which account the Judges might feel it their duty to do all in their power to ſave the will: but it is the duty of a Court of Juſtice to do all in their power to diſappoint the proviſions of a will ſo unmeritorious and even unnatural as this.

The Fifth Charge of exceſs is for taking a number of lives merely to protract the truſt of accumulation and the veſting of the Executory Deviſes. Looking only to the letter and ſurface of the boundary, it is natural to ſuppoſe from the manner of expreſſing the rule a licence of chooſing lives in being without regard either to the number of lives or to their connection with the executory Deviſe beyond ſerving to extend the contingency; But in a Court of Juſtice the reaſon of the rule muſt be ſcrutinized, and it is a duty to be vigilant in guarding againſt abuſe, and for that purpoſe to be even auſtere in reſiſting all attempts to defeat the ſpirit of the rule under the ſhelter of its letter, to diſcountenance in the ſtrongeſt manner all tampering with the rule, and ſternly to reject all contrivances, however colourable, to elude its real boundary. The ſpirit of the rule, which the Courts have gradually eſtabliſhed as the boundary of Executory Deviſe, is the qualification of their indulgence, to prevent this irregular mode of entail from exceeding the limits of the regular and ſtrictly legal mode. It is not conſiſtent with the reaſon of this indulgence, or the ſpirit of ſuch a boundary, to permit lives in being to be taken indefinitely for the purpoſe of protracting Executory Deviſe to the utmoſt poſſible extent, the duration of an endefinite number of lives can accompliſh, or even to ſanction taking any great number of lives, only connected with the Executory Deviſe as they are uſed to extend it beyond the duration of a regular entail. Even the letter of the rule, as it is uſually expreſſed, rather imports, that the contingency muſt not exceed lives in being, than that any number of lives may be taken; and it is not neceſſary upon the letter of the rule in common parlance to ſuppoſe any number of lives in being without qualification. But, whatever may be the reſult of a dry interpretation of the letter of the rule, neither its ſpirit, nor the effect intended by the Judges in adopting, or rather conſtituting, it, nor the practice upon it, accord with an indefinite and unqualified number of lives. The ſpirit is not to permit Executory Deviſe to extend beyond the legal regular mode of entail: but if lives in being of any perſons and in any number may be taken for the baſis of Executory Deviſe, it may be upon the contingency of the death of the ſurvivor of all the exiſting branches of our Royal Family, of all the exiſting Peers of *Great Britain* and *Ireland*, all the exiſting Members of the two Houſes of Parliament in both Iſlands, all the perſons, whoſe lives are com-

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priſed in the ſeveral exiſting Tontines, and, if poſthumous perſons are to be conſidered as perſons in being, all children in the womb of all theſe claſſes of perſons.

This is not the utmoſt latitude. If the number of lives is to be quite indefinite, the contingency may be extended ſo long as any perſon can be found in *Europe*, or rather in any part of the known world, who was either living or in the womb at the death of the particular teſtator. It would become quite eaſy to conſtitute ſuch an entail as could not fail of continuing incapable of being barred above a Century, or rather near a Century and a half; for there is not a weekly Bill of Mortality for *London* and its vicinity, that does not contain the death of a perſon above the age of 100. Then adding the twenty-one years and the double allowance of nine or ten months for poſthumous children, with the chance of a minority, when the Executory Deviſe commences, there will be a certainty of 121 years and the chance of twenty-one years more. In the ordinary and legal mode of ſettlement there is not a probability of keeping an eſtate unalienable for above half a century; and the chance is much againſt its reaching that time.

As to the effect intended by the Judges in allowing lives in being as the baſis of Executory Deviſe, and the practice under that allowance, the idea of calling in an indefinite number of lives to ſpin out Executory Deviſe never occurred to the minds of thoſe, who gradually extended Executory Deviſe to the boundary of entail under legal ſettlement. For ſome time they heſitated as to exceeding one life: but this heſitation was overcome by the good ſenſe of *Hale*, *Bridgman*, Lord *Nottingham*, and other diſtinguiſhed Judges; who ſaw, that to conſtitute the boundary with a juſt analogy to legal ſettlement it was neceſſary to allow to the irregular entail the ſame proportion of lives, as was of courſe allowed under the regular ſpecies; that is, the lives of as many perſons in being as were the real objects of the proviſion under the particular will or ſettlement. To this uſe of lives in being for the contingency of Executory Deviſe is to be applied the language of Lord *Hale*, and after him of Judge *Twiſden* and others, when they obſerved upon the allowance of ſeveral lives, that *all the candles were lighted at once*; and therefore it was only the duration of one life. Accordingly in *Scattergood* v.

Edge the Court ſpoke of twenty-five or thirty years as the probable reſult of taking lives in being. This way of conſidering it is no ill calculation, as applied to eſtates for life in the common courſe of Family ſettlements, but is ridiculous, when applied to an indefinite number of lives unconnected with the property deviſed or ſettled, except by being called in aid to defraud the real ſpirit of the rule of Executory Deviſe, and to abuſe its indulgence. Had ſuch an attempt been expected by the Judges, to whom we owe both the permiſſion and boundary of Executory Deviſe, it is probable, that, while they were making out the indulgence to ſuit the general convenience, they would have been more explicit in guarding againſt a miſconception of the ſenſe, in which they extended Executory Deviſe from one life to ſeveral. But the practice under the rule as to lives in being proves, the Courts were well underſtood. The ſtep from one life to two or more was taken by Lord *Hale* juſt after the *Reſtoration*, or, according to Lord *Nottingham's Manuſcript Reports* and *Prolegomena*, a few years before; and it appears by Lord *Bridgman's Manuſcript Reports*, that Lord *Hale* was ſoon followed by the other Judges: but, though almoſt a Century and a half have ſince paſſed, I doubt, whether a ſingle inſtance has occurred of an attempt to act upon the rule, as giving a right to take an indefinite number of lives to protract Executory Deviſe, or even till this caſe a ſingle inſtance of an approach to experiment in that way. Neither Mr. *Hopkins* nor Mr. *Bradley* attempted this ſpecies of fraud upon the rule. It is not to be endured for the moſt meritorious Executory Deviſe, much leſs for this. That this will amounts to tampering with the rule as to lives in being is groſsly apparent.

The Sixth Charge of exceſs of the limits of Executory Deviſe ariſes upon the proviſion ſtill farther protracting the accumulation, until purchaſes of land ſhall be actually effected. The effect of this, unleſs a conſtruction is adopted to make it determinable with the laſt life, will be to give a chance of a farther, uncertain, poſtponement of enjoyment under theſe Executory Deviſes. In point of actual enjoyment the whole reſiduary deviſe is affected by this farther attempt at protraction, ſubſtituted in the place of the general proviſion, that until the purchaſe the intereſt ſhall go to the ſame perſon, to whom the rents and profits of the land, when purchaſed, would belong (a).

(a) See the note *ante* 267.

In addition to this the teſtator attempts a ſtill farther protraction as well of the veſting as of the actual enjoyment by making it uncertain, who will be the male lineal deſcendants to take beneficially, till the moment of actual partition. It depends upon the conſtruction of the word "then" in the clauſe directing the partition. The expreſſion "then living" means living at the time of that conveyence. It is clearly ſo according to the literal conſtruction by reference to the laſt antecedent. The general purpoſe of this Teſtator alſo favours that conſtruction.

Second General Head.—The conſequence of overruling the objections to the legality of theſe Truſts muſt be, that Executory Deviſe may be applied to prevent all alienation of property for 120 or even 140 years; and by combining with it accumulation it may be poſſible to prohibit all beneficial enjoyment during the ſame period. Such a combination of Truſt of accumulation with Executory Deviſe could not be endured without the moſt glaring and dangerous miſchief to the Community by locking up an immenſe property and the income of it for many years to the great injury of the commerce, the revenue, and the wealth, of the Country; by monopolizing and reducing into a ſtate of *Mortmain* the landed eſtates of the Kingdom to a great extent, and by giving at the end of that period poſſibly to one individual a property producing a revenue equal to the Civil Liſt upon a moderate calculation. This may be imitated in other inſtances, and carried to a much greater extent, upon the principles, which muſt be eſtabliſhed by a judgment in favor of theſe truſts. But by a combination of accumulation with Executory Deviſe, even confining the latter to its proper limits, the incidental public miſchief would be very great by affording very probable means of protracting accumulation for half a Century. The powers conferred by the Law or indulged by the Judicature of the Country, *viz.* the general and ſtrictly legal teſtamentary power, the particular and indulged power of Executory Deviſe, and the permitted power of creating truſts, all exiſt under limitations wholly inconſiſtent with ſheltering truſt of accumulation under Executory Deviſe. The general teſtamentary power was given in order to regulate the uſe and enjoyment of property. Executory Deviſe was indulged againſt the genius of our Law, and almoſt againſt its precepts, for general accommodation. Truſt alſo, a ſtranger to our Law, was adopted by our Courts of Equity for the ſake of general convenience under an implied reſervation of a diſcretion not to allow it for any unmeritorious purpoſe againſt public good. The Courts both of Law and Equity upon the principle of public good and public convenience reject cuſtoms, conditions, covenants, and agreements. Truſt of poſthumous accumulation in any extent I take to be rather a novel practice. I doubt, whether it can be traced much higher than the commencement of Lord *Hardwicke*'s adminiſtration of Equity. I take it to have been unknown long after Lord *Nottingham*'s time; and, had the attempt been early made to combine it with Executory Deviſe, probably it would have checked the eſtabliſhment of Executory Deviſe itſelf. In ſtrictneſs ſuch poſthumous truſts for aggrandizing Families proſpectively by ſuſpending all beneficial enjoyment ought not to have been in any degree countenanced by Courts of Equity; without whoſe aid poſthumous accumulation would be wholly impracticable. However the practice of poſthumous accumulation has, I confeſs, by ſome means inſinuated itſelf. During infancy and inſanity ſuch a truſt is ſcarce more than a reſtraint upon expenditure almoſt neceſſarily incident to that ſituation. On that account perhaps a truſt for the ſame purpoſe eſcaped obſervation. This might lead to attempts at the ſame thing for a ſhort time afterwards, and in a way independent both of minority and mental incapacity. Thus inſenſibly Truſt of accumulation obtained ſome ſort of footing. At length, I believe, even reſpectable Lawyers have been led to ſuppoſe it allowable to annex Truſt of accumulation to Executory Deviſe, as if they were of the ſame nature; and this notion may have been encouraged by ſome few caſes, in which the Executory Deviſee has prevailed in obtaining the intermediate profits between the death of the teſtator and the veſting of the Executory Deviſe. But the point of allowing the ſame latitude to Truſt of accumulation as to Executory Deviſe, as far as I know at preſent, has never been regularly debated. In the caſe upon Mr. *Bradley*'s will there was an opening for arguing the point on behalf of his next of kin: but it became unneceſſary for them to contend it; Lord *Thurlow* inſtantly queſtioning the whole truſt, and, after hearing the *Attorney-General* in ſupport of it, decreeing for the next of kin without calling for any argument in their favor. Had the deciſion been againſt them, it might have led to the diſcuſſion of the point, whether Truſt of accumulation may be co-extenſive with Executory Deviſe;

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THELLUSSON *v.* WOODFORD.

viſe; for the will ſeems framed with a view to experiment in that way by directing a Truſt of accumulation for a moiety of the yearly income of a capital of about 30,000 *l.* for thirty years, and then a Truſt of accumulation for a ſmaller portion of the ſame yearly income for ſixty years more. By thus qualifying and dividing his Truſt of accumulation, and making it ſubſervient to a Truſt to buy ſuch Books as might have a tendency to promote the intereſt of virtue and Religion, and the happineſs of mankind, and to diſtribute ſuch Books in *Great Britain* and the *Britiſh* dominions, and farther by calling in the Court of Chancery to aſſiſt in carrying this *Charity*, as Mr. *Bradley* calls it, into execution, he probably thought, he ſhould ſucceed, or at leaſt that he ſhould carry his point to the extent of his firſt ſtage of accumulation of thirty years, under the colour of Religion and Morality: but Lord *Thurlow* required to know, what could be urged in favor of ſo ſtrange and vague a truſt, and, immediately after the *Attorney-General* had been heard in ſupport of it, annulled the Truſt, and gave the property to the next of kin.

The truth, I believe, is, it remains to adjuſt the boundary of Truſt of accumulation. The boundary ought not to be ſo extenſive as that of Executory Deviſe. Lives in being and twenty-one years may be a reaſonable and proper allowance for entail, and yet be intolerable as a period for the prohibition of all uſe and enjoyment of property. At leaſt ſuch a deciſion ought not to be made in ſuch a Caſe as this.

Third General Head.—The objections under this head ariſe from the particular language, in which the beneficial deviſes to take place under the partition directed are deſcribed. The teſtator might mean the eldeſt male lineal deſcendant in point of age without in any degree regarding heirſhip. That ſeems to be the moſt literal interpretation: but it is not very probable. He might mean ſuch deſcendant as ſhould be heir male of the body of each ſon, being both heir general and heir male. He might alſo mean the heir male, as uſually oppoſed to the heir general. Will the Court undertake to gueſs what the teſtator intended? Will they not rather ſay, the will is too uncertain to be interpreted; and that it is fit, the diſpoſition, the Law makes for the Family, ſhall prevail? But this uncertainty as to the perſon to take is not the only one. There is another uncertainty as to the time, when the deſcription ſhall attach. He might mean the eldeſt male lineal deſcendant at the very moment the Truſt of accumulation ſhould ceaſe: but he might mean one of four periods more diſtant; *viz.* when all the accumulating fund ſhall be inveſted in land, or when the lands ſhall be valued, or when they ſhall be allotted for partition, or when the conveyance ſhall be executed. The ſame ambiguity is found in the limitations in remainder. All this obſcurity ariſes from the Teſtator's anxiety to continue the ſecret, who is to take.

It is certainly the duty of a Court of Juſtice to give effect to laſt Wills; and it is difficult to annul them for uncertainty: but they are ſometimes rejected on that ground; and deeds and agreements have been ſet aſide for the ſame reaſon. In 8 *Vin.* tit. *Deviſe* D. there is a large collection of Caſes upon Wills of this deſcription: in many of them deviſes and legacies are condemned for uncertainty. *Equity Caſes Abridged* furniſh ſome precedents of the ſame nature. The ſame ſubject is taken up with ſome additions in tit. *Legacy and Deviſe*, in the new Edition of *Bacon's Abridgement;* which well deſerves to be entitled an improved Edition. In 14 *Vin.* tit. *Grant R.* there are inſtances of Grants void for uncertainty. In *Bacon's Abridgement*, the ſame tit. *C.* and *F.* there is much explanation upon that ſubject. If lands are given to *A.* for life; remainder to *B.* in tail; remainder to *C. in formâ predictâ;* it is void for uncertainty: *Co. Lit.* 20 *b.* In *Corbet's* caſe 1 *C.* 84 *b.* 85 *a. Anderſon*, citing a caſe, in which a condition enlarging a leaſe for life to a fee was held void for uncertainty, accounts for it by obſerving, that Judges ought to know the intent of the parties by certain and ſenſible words, which are agreeable and conſonant to the Rules of Law; and then he puts a farther caſe of grant, which was adjuged void for uncertainty. Lord *Vaughan* concludes his judgment in *Crowley* v. *Swindles Vaugh.* 176 by ſtating, that words being inſenſible ought to be rejected. In *Bromley* v. *Jefferies* 2 *Vern.* 415 Lord *Somers* refuſed ſpecific performance of an agreement, partly becauſe it was uncertain. In *Leſlie* v. *The Duke of Devonſhire* 2 *Bro. C. C.* 187 Lord *Kenyon* held a bequeſt of mortgages, which were ſo deviſed as to refer to two ſets of limitations of two other eſtates, without ſpecifying, which was meant, too uncertain to have effect; ſaying, that where the Court cannot ſee its way, the property muſt be conſidered as undiſpoſed of. In *Thomas* v.

Thomas 6 *Term. Rep. B. R.* 671. a deviſe was held void for uncertainty as to the Deviſee. In *Lord Walpole* v. *Lord Orford* (ante vol. 3. 402) your Lordſhip would not execute an agreement to make mutual Wills; and one reaſon was, that the agreement was too uncertain. Mr. *Bradley*'s will was thought by Lord *Thurlow* too vague to be executed.

The Books furniſh no inſtance of ſuch uncertainty as ariſes upon this will.

The conſequence of refuſing to ſave the beneficial Truſts for the male Deſcendants of the Teſtator's Sons will not be to let in the Truſt towards paying off the national debt. There are indeed caſes both of Remainders and Executory Deviſes (*a*), which have been held to operate immediately, where the preceding eſtates have failed of taking effect: but there is not any room for applying ſuch caſes to this will; for the ultimate remainder to the Truſtees in fee is not immediately and ſimply upon a Truſt to ſell the lands for the uſe of the Sinking Fund, but that Truſt is the ſubject of a ſubſequent, diſtinct, clauſe, expreſsly directing it to take place upon failure of male lineal Deſcendants of the Teſtator's three ſons, as aforeſaid. Therefore to let in that Truſt, while there are any ſuch Deſcendants would be againſt the expreſs language of the will. It is in effect the ſame as if it was ſimply on a general failure of iſſue male of the three ſons; and on that ground it is void.

Mr. Piggott and Mr. King for the acting Truſtees; Mr. Sutton for William Thelluſſon and Frederick Thelluſſon, the two Grandſons of the teſtator born after his death; The Attorney General, Solicitor General, and Mr. Campbell for the Crown.—The only queſtion is, whether the Teſtator has tranſgreſſed any of the rules of Law or Equity? All attempts to ſuſpend the power of alienation beyond the period allowed by law have been met in this court with the objection, that *it tends to a perpetuity*. Theſe words, though vague, have received a conſtruction, that has eſtabliſhed the criterion with almoſt the preciſion of a definition. It is impoſſible without ſhaking what is fixed, unſettling what is ſettled, and overturning what is eſtabliſhed, to comply with the prayer of this Bill. All argument as to the *quantum* of the property or the nature of the

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(*a*) *Fearne's Cont. Rem.* 360. 454. *Exec. Dev.* 392. *Ed.* 4. *Avelyn* v. *Ward*, 1 *Veſ.* 420; particularly 423. *Hodgſon* v. *Ambroſe, Dougl.* 323. 2 *Term Rep. B. R.* 251.

diſpoſition muſt be laid aſide. The deciſion muſt be the ſame, as if the property was 100 l. It is not the province of this Court to paſs any judgment upon the nature of the diſpoſition, or to inveſtigate the motives. It reſults from the power, every owner of property has, to make a will in the eyes of all but himſelf capricious. Neither can it be put upon the accumulation, nor upon the ſimple fact of nine lives; for accumulation for nine bad lives cannot be ſtated to be as long as for one extremely good life. The propoſition therefore is, that 600,000l. cannot be directed to accumulate for ſo many of ſuch lives as are deſcribed in this will, upon calculations of their poſſible duration. The teſtator has not gone to the extent of the rule, either by putting in as many lives as he might have done, or in other reſpects. He might have extended it to the time, when the deſcendant, he has pointed out, would attain the age of twenty-one: but the ownerſhip of the eſtate is not ſuſpended a moment longer than the duration of theſe nine lives; and the moment they have ceaſed to exiſt there will be a Tenant in tail in exiſtence. There is a ſpecial *deſignatio perſonæ*, who ſhall be at that time heir male of the body of the teſtator. In the conſtruction of a will it is ridiculous to talk of grammatical rules, if the Court is poſſeſſed of the real intention. All the argument upon the deſcription of the perſon to take, may be laid out of the caſe. There are ſtrong indications, who are meant: but it is enough to ſay, that if all theſe perſons die in ten years, or to-morrow, the Crown muſt take, if the limitation to the Crown is good. It may happen, that there ſhall not exiſt any male deſcendant but one anſwering the deſcription of heir of the body of each of theſe three perſons. There is no objection therefore; admitting, that it may be poſſible, that in ſome certain contingencies queſtions might ariſe, upon which it would be difficult to decide, to whom the fund would belong. Suppoſe, the teſtator had given the reſidue of his real and perſonal eſtate to ſuch perſon as ſhould anſwer the deſcription of heir male of his body at the death of all his deſcendants living at his deceaſe: the whole effect of this will with regard to the perſon, to whom the property is limited, and the time, at which he is to take a veſted intereſt, would have been directed in that ſhort way.

Where then is the abuſe? Where is the fraud upon the law? Where the extenſion of the right to make an Executory Deviſe?

Firſt, it is ſaid, the Teſtator has not thought proper to give the uſufruct to ſome perſon, who ſhall be in being to ſpend it. Where is it to be found as a term of qualification upon the right of creating an Executory Deviſe, that the rents and profits in the mean time ſhall be given? From the right to appoint an owner at a diſtant period the power to give that perſon alſo the rents and profits, that ſhall accrue in the interval, neceſſarily reſults as an incident. There is no trace of ſuch an argument, that the validity of an Executory Deviſe is to depend upon the manner, in which the rents and profits to accrue in the mean time are diſpoſed of. The diſcuſſion as to what ſhall become of the rents and profits is perfectly familiar to the Court. The queſtion is a queſtion of intention. For the heir it is ſaid, there is no expreſs deviſe of the rents and profits: therefore the heir is not diſinherited. According to the argument now urged it is more than a queſtion of intention: it is a queſtion of the validity of the intention. Upon an Executory Deviſe of perſonal eſtate, if the teſtator is perfectly ſilent as to the intereſt, it goes with it, unleſs it is compriſed in the reſidue, and not to the next of kin.

It is ſurpriſing, that it ſhould be doubted, whether the attention of this Court has been much given to accumulation. There are many caſes, in which accumulation has been directed by the Court, becauſe the Teſtator has expreſsly directed it: others, in which it has been directed, not for that reaſon, but becauſe the will contains indications of ſuch an intention; and others, in which the attention of the Court has been ſo much drawn to the legality of the accumulation directed as to fix the period, beyond which it ſhall not go. There are many caſes, in which the attention of the Court has not been called to the ſubject; which is to be accounted for upon this; that large as the property may have been, there was no provocation to argue a point ſo well ſettled. In the caſe upon Lady *Deniſon*'s will, at the rolls, 11th of *July*, 1787, when Lord *Kenyon* was maſter of the rolls, the queſtion of accumulation was much conſidered, and with a great prejudice againſt it: but Lord *Kenyon* thought, it could not be prevented. The teſtatrix had two nieces, the Miſs *Midgeleys*, both very young, one not more than four or five years of age, at the date of the will. The teſtatrix directed, that the reſidue of her perſonal eſtate ſhould be inveſted in the purchaſe of land, and that the rents and profits of the land to be purchaſed and of her real eſtates at *Wheatwood*, &c. ſhould accumulate, until there ſhall be a ſecond ſon of the body of the eldeſt niece, who ſhall have attained the age of twenty-one: in default of ſuch ſecond ſon, until ſuch other ſon or perſon ſhall attain twenty-one, as ſhall in the order aftermentioned be entitled to have a conveyance; and ſhe directed a conveyance of the whole property at that period to and for the uſe of ſuch ſecond ſon, and the heirs male of the body of ſuch ſon lawfully iſſuing, ſo as he be not made ſtrictly tenant for life, &c. It appears, ſhe was aware of the law. It was contended, that the limitations were too remote. The decree declared the will well proved; that the truſts ought to be eſtabliſhed and carried into execution; and that the limitations of the real eſtate were good limitations, and the bequeſt of the perſonal eſtate to be laid out in land was a good bequeſt. That accumulation is now going on.

In a late caſe upon Sir *John Webb*'s will (*a*) he deviſed to the ſecond ſon of his grand-daughter, who was a child perfectly infant, an eſtate of 10,000*l.* a-year; which was to accumulate, till that ſon ſhould attain the age of twenty-one. It is poſſible, that may go to the full extent of ſeventy years; and that was confirmed. In *Gibſon* v. *Lord Montfort*, or, as it is ſometimes called, *Gibſon* v. *Rogers*, 1 *Veſ.* 485, upon Mr. *Shepherd*'s will, the firſt queſtion, that aroſe, was, whether accumulation was directed. Lord *Hardwicke* held, that it was; and that it was good; that a bequeſt of all the reſidue of the perſonal eſtate in the nature of an Executory Deviſe will carry the intermediate profits, provided the limitation is not too remote; and that the reſidue of the real eſtate being given with that of the perſonal was an indication of the ſame intention as to the real eſtate; therefore the general rule, that took place in *Hopkins* v. *Hopkins*, did not apply. That cauſe was decided in 1750. The Teſtator's daughter, to whoſe children the reſidue of his real and perſonal eſtate was given, is ſtill living. If ſhe had not had a child, the accumulation would have been now going on, and would have continued till her death; and there is a fair probability, that it might have proceeded for twenty years more. It did not determine till the birth of the Marchioneſs of *Hertford*. Upon her birth a bill was filed, claiming the rents and

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(*a*) That will was eſtabliſhed and the directions were given for carrying the truſts into execution, by a decree made in the ſittings after *Trinity* term 1799.

profits, that had accumulated, and thoſe, that ſhould accrue till the birth of another child of Lady *Irwin*; and it was determined according to the prayer of that bill; and that, as other children of Lady *Irwin* ſhould be born, they ſhould be let in (*a*).

There was no accumulation in *Sabbarton* v. *Sabbarton*, *For.* 245.: but that caſe and *Chapman* v. *Bliſſet*, *For.* 145. ſhew, that the general words will carry over the intermediate rents and profits. In every caſe, in which they have been given to the heir, it has been upon the ground, that the will does not take them from the heir. *Phipps* v. *Kelynge*, in Mr. *Powell*'s edition of *Fearne's Executory Deviſes* 84. 160. deciſively proves, that Lord *Camden*'s opinion was, that the time of poſtponing the veſting is the period, during which the accumulation of the intermediate rents and profits may go on. *Lade* v. *Holford*, *Amb.* 479. 3 *Bur.* 1416. is an authority for the ſame poſition: no objection was taken to the accumulation under the proviſo to the extent of the age of twenty-one of the unborn tenant in tail: but the expreſs ground was, that it was to go five years beyond the time allowed by the law. In *Perry* v. *Phelips*, 108. (*ante*, vol. 4.) the accumulation of the rents and profits continued for fifty years, during the whole life of *Thomas Lockyer*. He might have left his widow *enſient*; and if the child had attained the age of twenty-one the accumulation would have continued ſeventy years.

In *Hopkins* v. *Hopkins* the attention of the Court was diſtinctly called to the ſubject of accumulation. The will had provided for an accumulation in certain events. The diſpoſition was far from being improper. The education of the perſon, who was preſumptive heir of the teſtator, was not ſuitable to the property. The teſtator having adopted a ſon of that perſon made a handſome proviſion for the father, and gave to the ſon of that perſon at the age of twenty-one the reſidue of his property; and if he ſhould have no ſon, who ſhould attain that age, he gave it to the ſons of his daughters in ſucceſſion. The boy, the principal object of his bounty, died before him; and the conſe-

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(*a*) The *Lord Chancellor* obſerved, that the directions upon Mr. *Shepherd's* will were given upon a bill filed by the deviſees; and the *Attorney-General* was made a party; as it was not known, that there was an heir at law. Afterwards a perſon named *White* came from *America*, and filed a bill, claiming as heir at law; and that cauſe was determined by Lord *Northington*; ſo that the queſtion was raiſed in that cauſe.

quence was, no perſon anſwering the deſcription of a ſon of *John Hopkins*, the heir, was in exiſtence at the teſtator's death. It was determined, there was no diſpoſition of the intervening rents and profits; and therefore they went to the heir. The heir had a ſon afterwards born. During the minority of that ſon accumulation was directed by an expreſs clauſe of the will. That child lived only two or three months. An accumulation of 6000*l.* remained in this Court, till the late Mr. *Hopkins*, being the ſon of the third daughter of the teſtator's heir at law, upon the death of the heir became entitled; and that ſum was upon his application laid out in land; which was conveyed to him upon his becoming entitled upon the death of the heir without leaving a ſon, or a grandſon by an elder daughter. A ſupplemental bill was filed; and the eſtate was taken into the hands of the Court, and put into a ſtate of accumulation. *John Dare* alſo claimed the accumulation and the whole property upon the ground, that an end was put by the birth of the ſon of the heir at law to the Executory Deviſe; the freehold veſting in that ſon; and that all the ſubſequent limitations thereupon became contingent remainders; and *John Dare* was the firſt remainder-man *in eſſe*. That queſtion was diſcuſſed; and *Dare*'s bill was diſmiſſed upon the ground, that there might ſtill be a ſon of the heir at law; who upon attaining the age of twenty-one would be entitled to the eſtate and the accumulation.

Studholme v. *Hodgſon*, 3 *P. Will.* 299. is a caſe of accumulation during the whole life of *Mary Hodgſon*; at whoſe death it was to be determined, whether the plaintiff was entitled or not. *Trevanion* v. *Vivian*, 2 *Veſ.* 430. is another inſtance of accumulation. Theſe deciſions in conformity to *Gibſon* v. *Lord Montfort* decide, that the Court takes the real or perſonal eſtate, and directs accumulation. The queſtion has been obviouſly before the Court in theſe caſes; and that there are many others of the ſame kind there can be no doubt. There is one moſt common diſpoſition, that is in truth an accumulation, an inſtance of which occurred upon Sir *Nicholas Carey*'s will. For particular reaſons giving his daughter an annuity he made a future diſpoſition; and directed, that in the mean time the property ſhould accumulate and be applied in diſcharge of incumbrances. That is very common as to *Weſt India* eſtates. Is there any difference in purchaſing mortgages upon his own eſtate and mortgages upon the

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eſtate of another perſon? Accumulation may happen in the ordinary caſe. Suppoſe, the truſt was to convey to a ſon of the teſtator's infant ſon; and that ſon dies, leaving an infant ſon: this Court in its ordinary juriſdiction would accumulate the rents and profits; and muſt do ſo, if the neceſſity of the accumulation ſhould continue for two centuries; and the inſtances of *Parr* and *Jenkins* ſhew, to what a length it may run. Suppoſe, the teſtator had nine lunatic children, and had given his property among them with limitations in the nature of croſs remainders: the Court muſt have carried on the accumulation during the lives of all of them; which is the preciſe inconvenience alledged in this caſe. Accumulation is the ſettled, habitual, practice of the Court. Where an Executory Deviſe is allowed to take effect, and the intermediate profits cannot be claimed for the heir at law, the Court as regularly decrees an accumulation as it makes a decree upon the ſubject. The accumulation therefore ſimply taken is no objection.

The objection from the number of lives is not, that the veſting is poſtponed for nine lives. The very principle of the bill negatives that. There can be no doubt, that a poſtponement of the veſting for nine lives of ſome ſpecies is not equal in all probability to a poſtponement for two lives or one life of another nature; viz. nine lives of the age of ninety, and two of twenty, or one of fifteen. As to the objection, that the lives of all the members of the Houſes of Lords and Commons or other more numerous claſſes of perſons may be taken, when it is aſſerted, that the rule permits the veſting to be poſtponed during as many lives as can be ſtated, it muſt be aſſerted with this qualification; provided, they are not more than will admit of making out by reaſonable evidence, at what time the ſurvivor ceaſes to exiſt, it is within the rule; and much leſs public inconvenience will enſue than by the more limited conſtruction. In *Scattergood* v. *Edge* the rule is laid down in plain and intelligible terms with reference to the very circumſtance of the number of lives; that it does not ſignify, how great the number is; for it is but for the life of the ſurvivor, and therefore but the life of one perſon. It could not eſcape the Judges, who ſo ſtated the rule, that the life of that perſon might extend to 100 years, and might apply to a property, the *quantum* of which may be more or leſs. So they did ſtate the rule; and it is impoſſible by way of hypotheſis to put a ſtronger caſe to ſhew, that, unleſs your *Lordſhip* leaves it to the Legiſlature to vary it, you muſt ſtrike the whole doctrine of Executory Deviſe out of the books. This teſtator being informed, that he might poſtpone the veſting of his property during lives in being makes his will upon the ſtate of his family. Suppoſe, he had only one ſon at the date of his will, and that having made his will in the general terms before ſtated, giving his property to the heir male of his body at the death of all his deſcendants, who ſhould be living at his death, he had lived very long after the date of his will: it might be, that at his death there would be only that one ſon: it might happen, that ſon might have had children, and they might have had children; and till the inſtant of his death no Court could have told him even the *data* of calculation with regard to the ſtate of his family at his death. The only rule therefore to guide teſtators is, that, let the perſons deſcribed proſpectively be few or many, it is equally good or bad. It cannot be known, where this is to ſtop. The number of lives might depend upon the conjugal affection of Mr. *Thelluſſon* and his ſons.

As to the inconvenience from the accumulation of ſuch a property, the queſtion is, whether that is a greater inconvenience than breaking in upon a decided, intelligible, rule, the principle of the whole doctrine of Executory Deviſe, which was eſtabliſhed, as was obſerved in *Hopkins* v. *Hopkins* (*a*), to gratify teſtators, and placing teſtators in this ſituation; that it is impoſſible to ſay till after their deaths, in what manner calculations of the Actuary of an Inſurance Office will, in the judgment of the Court affect their Wills. A caſe of inconvenience may be put upon the acknowledged rule, which would perhaps ſtartle the Legiſlature. It cannot be diſputed, that any man may make his eſtate unalienable, with accumulation, for one life and twenty-one years afterwards. Suppoſe, all the Gentlemen of a County aſſembled in a Grand Jury were to join in making their wills, as has been done on board a ſhip, and were to tie up all the property of that County for one life and twenty-one years: it would be a caſe of ſurpriſe upon the wiſdom of the rule, upon which your Lordſhip muſt act. That is unlikely to happen. So is this. This is not likely to be ſuch a general inconvenience, that a Court of Juſtice

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(*a*) *For.* 50.

can act upon it; for the general convenience of mankind provides, that ſuch caſes ſhall not happen with ſufficient frequency to introduce a general miſchief.

It has occurred in a great variety of caſes, that there have been more lives than one. In *Humberſton* v. *Humberſton* Lord *Cowper* made fifty ſucceſſive tenants for life; and ſuſpended alienation for all their lives. In the claſs of caſes upon a limitation over of a Term for Years or of perſonal property after the death of a perſon without iſſue the queſtion has always depended upon this; whether the failure of iſſue was general, or confined to the lives of ſome particular perſons: *Sheffield* v. *Lord Orrery*, 3 *Atk.* 282, and many other caſes before Lord *Hardwicke* (*a*). The rule is underſtood in the ſame unqualified ſenſe in *Low* v. *Burron*, 3 *P. Will.* 265. by Lord *Talbot*, in *Keily* v. *Fowler*, 6 *Bro. P. C.* 309. by Lord Chief Juſtice *Wilmot*, and by Mr. Juſtice *Buller* in *Doe* v. *Lyde*, 1 *Term Rep. B. R.* 593. Property has often been made unalienable for a great length of time, from the difficulty of finding a purchaſe. In —— *Worthing*'s will a ſum of 1000*l.* was ſo much involved, that it could not be releaſed for the purpoſe of laying it out in land till the other day, about fifty years afterwards, when a recovery of the land was ſuffered by Lord *Dunmore*, a very remote remainder-man. It is ſuppoſed, that Executory Deviſes are under your Lordſhip's control in ſome particular way; and that the Court is at liberty to indulge ſomething of diſcretion. If that is ſo, how juſt was Mr. *Selden*'s reflection! Your Lordſhip has no more power over Executory Deviſe than over other diſpoſitions of property; nor over truſts, except to provide for the execution of them. Executory Deviſes are not ſuch novel things, as is ſuppoſed. *Gowdchep's Caſe*, the firſt cited by Mr. *Hargrave*, was in the time of *Edward* the Third. The diſtinction between Deviſes Executed and Executory was perfectly well known to thoſe, who decided that caſe. They are contradiſtinguiſhed, as truſts Executed from truſts Executory. The deciſions as to Executory Deviſes are as much deciſions of Law as any others. The Court has no diſcretion. The queſtion is, what are the principles eſtabliſhed by all the caſes, as forming the

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(*a*) See the Caſes collected in Mr. *Cox*'s note upon *Atkinſon* v. *Hutchinſon*, 3 *P. Will.* 262. and Mr. *Sander*'s notes upon *Dormer* v. *Beauclerk*, 2 *Atk.* 308. *Fearne's Executory Deviſes* 167, &c. *Ed.* 4. by Mr. *Powell*. See alſo *Evereſt* v. *Gell*, and *Chandleſs* v. *Price*, *ante*, vol. 1. 286. vol. 3. 99.

boundary. They are, that an eſtate may be limited upon a contingency to take effect within lives in being and a certain portion of time afterwards. It is a miſtake to ſay, that may be extended to a Term in groſs for twenty-one years. That cannot be done. It is ſtrongly argued by one of the Counſel in *The Duke of Norfolk's Caſe*, 3 *Ch. Ca.* 42., that a Term for years cannot be given upon the death of a perſon without iſſue within twenty years any more than within 1000 years. The Law has provided no rule upon that; for as to limitations for years no line can be drawn. The principle of Executory Deviſe inſtead of being limited has been extended from the firſt period down to the caſe of *Long* v. *Blackall.*

As to the deſcription of the lives, during which this accumulation is to continue, and of the perſons, who are to take beneficially, when it ſhall ceaſe, it is impoſſible, the Teſtator could mean an indefinite failure of iſſue. With reſpect to the ſuppoſition, that he meant twenty-one years, it was not the intention to comprehend in the deſcription of perſons named perſons, who ſhould come into exiſtence in ſucceſſion. He meant co-exiſting perſons *in eſſe* together. He intended, I admit, all ſuch perſons as were the deſcendants of the perſons named, in actual exiſtence at the date of the will, who ſhould be living at his deceaſe, or ſhould be born in due time afterwards. Upon thoſe words, what is the meaning of the expreſſion "*living at my deceaſe?* This is always a queſtion of intention. Theſe words in this will cannot mean children born in due time afterwards: that is children *en ventre.* I by no means admit the implied double allowance mentioned by Mr. *Hargrave.* It would make no difference: but I doubt, this will does not afford it; for the teſtator, when he comes to deſcribe the perſons to take, does not uſe both expreſſions; and is therefore not to be ſuppoſed to include both ideas. He does not there uſe the words "born in due time afterwards." But ſuppoſing, he did mean that: it reverts then to the true queſtion; whether a teſtator can limit an eſtate to veſt in poſſeſſion at the end of a life to come into being within the period allowed by Law for the birth of a poſthumous child: that is, whether a child *en ventre* is to be taken to be in being for this purpoſe. Such children are conſidered in being for a variety of purpoſes. They are conſidered as living at the death of an inteſtate within the *Statute* of Diſtribution.

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tion(*a*). They were always capable of taking by deſcent either in fee or in tail. It is admitted, they are to be conſidered in being, in all caſes, where it is for their benefit to be ſo conſidered. But the Law takes notice of ſuch children independent of their benefit. They may be barred. They may be vouched in a warranty. Lord *Coke* gives the form of the Voucher (*b*); that *A.*, if born, will be the heir, and is to be vouched; and if that child ſhall not be born, *B.* will be heir; and he muſt be vouched; as the other may not be born. A feoffment may be made to the uſe of *A.*, till a child *en ventre* ſhall be born, and then to the uſe of that child. So, when truſts of perſonal property began, no doubt was entertained as to a truſt for ſuch child. By the *Civil Law* they were capable of being placed in very laborious ſituations: they might be inſtituted heirs or executors, not only by their fathers or mothers but even by ſtrangers; 2 *Domat.* 16. *Article* 22. In the caſes, that have been cited, the queſtion was a queſtion of intention. The Certificate in *Burdet* v. *Hopegood* ſhews the ground; that the father was not to be preſumed to intend to diſinherit his own child. In *Millar* v. *Turner*, upon Marriage Articles, the ſame ground is taken. So upon the *Statute of Diſtributions* the queſtion is, whether the Legiſlature intended, that ſuch a child ſhould take with the reſt. The real queſtion in ſuch caſes is, whether, if the child is deſcribed by words importing, that it is in being, the intention cannot enable ſuch child to take. It is, becauſe the child is conſidered in being, or, as the Books formally expreſs it, *in rerum naturâ*, that the intention is capable of taking effect. If a child *en ventre* is not a child living, it is in vain to ſay, the teſtator meant a child not living to take. It is not confined to caſes of benefit to the child. There is no ſuch rule with regard to Executory Deviſes, that they may be more remote in favor of ſuch children than of ſtrangers. In *Reeve* v. *Long* (*c*) it was determined by the Court of *Common Pleas*, and upon a Writ of Error by the Court of *King's Bench*, that a poſthumous child was not entitled under a limitation in ſtrict ſettlement. That judgment was reverſed by the Houſe of Lords: but it was reverſed againſt the opinion of all the Judges. That caſe gave riſe to the *Statute* (*d*). It was then underſtood

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(*a*) 22 and 23 *Cha.* 2. *c.* 10. 29 *Cha.* 2. *c.* 3. (*b*) *Co. Lit.* 390. *a.* (*c*) 1 *Salk.* 227. 3 *Lev.* 408. 4 *Mod.* 282. *Skinn.* 430. 12 *Mod.* 53. *Comb.* 252. *Carth.* 309. (*d*) 10 and 11 *Wil.* 3. *c.* 16.

therefore, that ſuch child was not conſidered in being even for its advantage. In *Long* v. *Blackall*, though, it is true, the poſthumous child was to have the benefit, the deciſion did not depend upon that. The queſtion was as to the validity of the limitation over; and it was ſupported, as not being too remote, conſidering the intereſt of that child out of the queſtion. It can never come in queſtion in ſuch caſes, whether by the words "living at the death" the teſtator means ſuch children *in rerum naturâ*, or perſons actually exiſting, upon the ground, that in one caſe the object of the Executory Deviſe is to provide for children, in the other, for ſtrangers; for the queſtion is not as to the perſon intended, but as to the time, during which the veſting is ſuſpended; whether this expreſſion can be uſed to deſcribe a perſon, that is to come into being, if at all, within nine or ten months; it being admitted, that if that perſon was in being, not only nine or ten months, but twenty-one years, might be added to the period of ſuſpenſion. If thoſe nine or ten months can be added at the end of the term, why may they not be prefixed at the beginning? The diſtinction would be too fine for the wiſdom of the Law.

But the teſtator has not confined himſelf to the words "*living at my deceaſe.* What is the obvious meaning of the words "*born in due time afterwards?*" Born within that time after the death of the teſtator, which is generally conſidered as the time of geſtation. That phraſe can have no meaning but by reference to the father of the child. This is preciſely the caſe of *Long* v. *Blackall.* A ſhort time before that caſe came before your Lordſhip, *Doe* v. *Clarke* (*a*) had been decided in the Court of *Common Pleas*; in which caſe it was moſt broadly laid down, that, independent of the intention, a child *en ventre* is to be conſidered as in being. It was intimated by me (*b*), that in point of fact this caſe was new *in ſpecie*, as giving the double allowance. Your Lordſhip ſent the caſe to the Court of *King's Bench* with a view to ſee, whether that doctrine ſo laid down in the Court of *Common Pleas*, not diſapproved by your Lordſhip, would meet the approbation of the Court of *King's Bench*, to give greater weight of authority to the doctrine of the Court of *Common Pleas*. Mr. *Chambre*'s argument diſtinctly puts it upon the fact, that the nine months were to precede the life; and he argued, that it could make no differenee; and the Court held,

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(*a*) 2 *H. Black.* 399. *ante*, vol. 2. 673.

(*b*) The Attorney-General.

that, the time being nine months after the deviſor's death, it was not as far as the law allowed; and therefore the deviſe was good.

That caſe has decided this; and more; *viz.* that a diſpoſition to take effect upon the death of a child *en ventre* at the teſtator's death without leaving iſſue is a good diſpoſition. It cannot be ſaid, that the time is extended in this caſe to the length, it might have reached in that: for in the ſubſequent part of the will the teſtator having omitted the words "*born in due time afterwards*" muſt there be ſuppoſed to mean perſons actually born at that time. If this will does not ſtand, that caſe muſt be overturned.

In *Whitelock* v. *Heddon*, 1 *Term Rep. C. B.* 243. (*a*), though the words were "*begotten and born*", the Court of *Common Pleas* laid it down, that it was fully ſettled, that the child *en ventre* was to be conſidered as begotten and born.

Try this upon a ſettlement of a term for years upon marriage in truſt for the huſband for life; after his deceaſe for the wife for life; and after the deceaſe of the ſurvivor, for the eldeſt ſon of the marriage, with a limitation over in caſe of his death under the age of twenty-one without leaving iſſue: the difficulty from the caſe of a poſthumous child can never ariſe. But ſuppoſe that limitation, inſtead of being to the huſband for life, and then to the wife for life, to be to the huſband for life, and after his deceaſe to the ſon, with the ſame limitation over: it would be extraordinary, if on account of the limitation to the wife interpoſed the poſthumous child ſhould take in the one caſe and not in the other. If it is ſaid, the child would take in the latter caſe, it leads neceſſarily to the double allowance; for if that child ſhould marry at the age of twenty, and die under twenty-one, leaving his wife pregnant, unleſs the child, with which ſhe is pregnant, is conſidered as iſſue left living at the death of its father, the limitation over muſt take place. That is not for the benefit of the child; for the conſequence of the father being conſidered as leaving iſſue would be, that his eſtate would be abſolute. It would go to his creditors, to his legatees, and his next of kin; and that child coming into exiſtence after the death of its father and being conſidered as living at that time might take no benefit.

(*a*) *Boſanquet and Puller's Reports.*

This doctrine is not new. In *Gulliver* v. *Wicket*, 1 *Wilſ.* 105. the Court ſaid, if there had been no deviſe for life, but it had been an Executory Deviſe to the child *en ventre ſa mere*, with a limitation over in caſe of the death of ſuch child under the age of twenty-one without leaving iſſue, it would have been good. That child might have married at the age of twenty, and have died under twenty-one leaving a child *en ventre ſa mere:* in which caſe, as the Judges put it, he would have died leaving iſſue living at his death. That is in point to prove, there may be the double allowance. There is no difficulty in a perſon not in being taking by Executory Deviſe for life: *Oakes* v. *Chalfont*, *Pol.* 38.: but a limitation over on the death of that perſon cannot take place (*a*). In *Chapman* v. *Brown*, 5 *Burr.* 1626. the caſe, where a line was omitted in the ſettlement, the Court had no doubt, that an eſtate for life to the unborn ſon would have been good: but there could not be a limitation over.

The clauſe of reſtriction cannot be diſconnected from all the deſcriptions of perſons, whoſe lives are ſpecified. It is one ſentence; and the qualification over-rides the whole. For what purpoſe did the teſtator uſe theſe words but from a knowledge of the rule of law? If this will is read as any other will, with a view to make it valid, not to avoid it, the words of reſtriction muſt be combined with all the limitations. This cannot be compared to the conſtruction put upon words in an Indictment or a *Mandamus.* In thoſe inſtruments there muſt be ſo much certainty, that there can be no doubt, not only what the drawer meant, but what every one elſe would underſtand, by the expreſſions uſed. Upon inſtruments of this kind every ſort of latitude is uſed. The Courts are in the conſtant habit of tranſpoſing words, and uſing every means to diſcover the intention.

As to the uncertainty in reſpect of the perſon to take, is there any real uncertainty in this deſcription? Taking the words together, eſpecially looking to other parts of the will, it is plain, nothing is meant but the perſon, who at that time ſhall happen to be heir male of the body of *Peter Iſaac Thelluſſon.* Is there more difficulty in aſcertaining this perſon than there was in the caſe of *Pyot* v. *Pyot* (*b*), where the teſtatrix gave to her neareſt relations of the name of *Pyot?* The Court ſaid, they

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(*a*) *Routledge* v. *Dorril*, *ante*, vol. 2. 286.

(*b*) 1 *Veſ.* 335.

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muſt find out the perſons. This difficulty is to occur at the expiration of theſe lives. When it does occur, then will be the proper time to diſcuſs it. Perhaps it may never ariſe. There may be a perſon anſwering every deſcription. Suppoſe, at the period ſpecified there ſhould be an eldeſt ſon of *John Thelluſſon*, the teſtator's grandſon: the perſon would be clear beyond all poſſibility of doubt. The clauſe directing the ſurname of *Thelluſſon* only to be uſed may have effect to prevent any other name from being taken.

But if the deſcription is uncertain, the Crown muſt take immediately (*a*). Nothing is more clear than that. In *Hopkins* v. *Hopkins* Lord *Hardwicke* held, that it did not follow, becauſe there might be ſome perſons, in whom the deviſe could not take effect, alluding to the deviſe to the ſons of unborn ſons and daughters, that the property ſhould not be taken care of for thoſe, for whom it could take effect. Theſe limitations may be qualified; and the Court may give effect to the intention of the teſtator ſo far as it is conſiſtent with the rules of law. There are many caſes, in which limitations have been qualified, though too remote and void *ab initio;* eſpecially in the caſe of an Executory truſt, as this is. *Humberſton* v. *Humberſton* was decided upon that diſtinction; which is fully diſcuſſed in *Fearne's Contingent Remainders*, 206, and *Fearne's Executory Deviſes*, 159, edition 5th, by *Powell.* The principle, upon which the doctrine of *Cy pres* has prevailed, that the general intention ſhall be executed, if the particular intention cannot take effect, applies preciſely to this caſe. The general intention of this will is to give to the eldeſt male lineal deſcendant. If the two grandſons of the teſtator born ſince his death are not to be conſidered as lives within the rules of law for the purpoſe of theſe truſts, they may be eventually entitled to this accumulated property.

The circumſtances, upon which this will is to receive a peculiar conſtruction, are the choice of lives, and the value of the property, of which the Court is informed by matter *dehors* the will. The Court cannot decide upon ſuch principles. As to the hardſhip of the caſe, it is unneceſſary to ſay much. The policy of the law has not inſtructed your Lordſhip to ſay, how much of the fruits

(*a*) See *Avelyn* v. *Ward*, 1 *Veſ.* 420.; particularly 423. *Hodgſon* v. *Ambroſe*, *Dougl.* 323. 2 *Term Rep. B. R.* 251. *Fearne's Contingent Remainders*, 360. 454. *Executory Deviſes*, 392. edit. 4.

of a laborious life a man may apply to ſatisfy the moral obligation, and how much to other objects, that he may apprehend to be publicly uſeful.

As to the inconvenience, I do not know, what is a fraud upon the rule, an abuſe of the rule, tampering with, evading, eluding, the rule. If the Court has the diſcretion contended for, it is equally competent to your Lordſhip to ſay, Executory Deviſe ſhall be barred by Recovery, as to overturn any other rule. Lord *Nottingham* did not mean, that his ſucceſſors in office ſhould be at liberty to overturn a rule eſtabliſhed in the very caſe, in which he decided. The rule ſo laid down might perhaps be left open: it is very difficult to ſay that: but, that all the doctrine ſettled ſince ſhould be liable to be overturned upon inconvenience, cannot be the meaning of any *dicta*, that can be ſtated.

Your Lordſhip will feel much more ſatisfaction in reſcuing this doctrine from the uncertainty, that, as the hiſtory given in this cauſe has eſtabliſhed, exiſted in a great part of the laſt Century, than in deciding upon principles, that will make it as uncertain during the whole of the next.

Mr. Manſfield in reply.—As to the uncertainty of the perſon to take the benefit of this deviſe, the only way that can be urged is, that, unleſs the will is clearly good, and it is impoſſible to doubt upon it, it might make a difference. At the ſame time it is impoſſible to deny, that there may by poſſibility be a perſon in being, who may anſwer this deſcription. I cannot agree, that it muſt mean heir male in the common ſenſe, or heir male of the body; nor, that the clauſe as to the name may be ſuppoſed intended merely to prevent the deviſee from taking another name. That proviſion muſt be with a view to the poſſibility, that a male deſcending through a female might become entitled. The place, in which words are found in a will, can have little effect upon the conſtruction, if the intention calls upon the Court to tranſpoſe them, or even to ſtrike them out: but if ever a will can be conſtrued grammatically, this will ought to be ſo conſtrued, rather than ſuch a purpoſe, as it manifeſts, ſhould be carried into execution.

The three great queſtions are, firſt, upon the limitations, as far as they tend to keep the property in ſuſpenſe and unalienable.

Secondly,

Secondly, as to the accumulation:

Thirdly, whether the life of a perſon in the womb can be conſidered a life in being within the ſenſe of thoſe caſes, which have decided, that property may be kept unalienable during a life or lives in being.

I cannot agree to the obſervation in its full extent, that in executing the truſts of a will your Lordſhip never can take into your conſideration, whether the will is the effect of caprice; whether it is rational, or not; and that, let it be the moſt irrational diſpoſition, that can be imagined, the Court is bound to execute it. I admit, your Lordſhip cannot put yourſelf in the place of the teſtator, and ſay, he has ill-provided for his family, diſinherited his children without reaſon, and made an injudicious diſpoſition of his property. It is the privilege of a teſtator to diſpoſe, as he pleaſes. But a will may be ſo irrational that the Court will not execute it. Suppoſe, before the laſt *Statute of Mortmain* (a) a man had by his will given 10,000 *l.* for the purpoſe of founding an Hoſpital for the maintenance of cats or hedge-hogs: it might be very well expreſſed: but would ſuch a purpoſe be executed? Is there a man living, who will not pronounce this will to be as irrational and abſurd as any will can be. It is not only irrational, but in its conſequences extremely pernicious: I do not dwell upon its being inofficious and almoſt wicked. What can be more pernicious, than that property of this immenſe amount ſhould be totally taken out of the ſtock of this Country, and be abſolutely uſeleſs for near a Century. If this will is good, accumulation of property may be continued till the death of the ſurvivor of any known deſcription of men. No inſtance has been mentioned of any attempt at ſuch limitations; no caſe, that bears any reſemblance to this. There are caſes, very few in number, where an eſtate has been ſo limited as for a certain length of time not to be veſted in any one; as, where it is given to the right heir of a living perſon: but there is no inſtance of extending it farther than two or three lives. The longeſt period was that in *Hopkins* v. *Hopkins*. From ſuch caſes an inference by no means ariſes, that any number of lives may be taken at the caprice of the teſtator for the purpoſe of poſtponing the veſting, not for the ſake of giving the eſtate to the ſon of any

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(a) 9 *Geo.* 2. *c.* 36.

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known perſon after the death of that perſon, but merely for the ſake of accumulating the rents and profits. The true queſtion is, how far any principle can be extracted from the caſes, calling upon your Lordſhip to ſupport this will. It has been ſtated, that this will falls perfectly within the caſes; but the whole ground of the argument amounts to this; that in ſome of them it has been ſaid, that a limitation by way of Executory Deviſe is good, if it does not exceed a life or lives in being and twenty-one years, upon the reaſon aſſigned by the compariſon of Lord *Hale* and Mr. Juſtice *Twiſden*, that *all the candles are burning together*. Do theſe expreſſions, found in thoſe caſes, in any degree warrant the inferences drawn from them in ſupport of ſuch an aſſumption of lives as this will takes, merely for the purpoſe of effecting, not what has a tendency to a perpetuity, but what is a perpetuity, with a view of preventing not only alienation but enjoyment for ſuch a length of time. I can hardly imagine, that Lord *Talbot* could ſeriouſly ſay, as he is repreſented in *Low* v. *Burron*, that the policy of the law would permit an eſtate to be kept unalienable during twenty lives. It is a mere *dictum* imputed to him in a caſe, that did not call for it, in which the queſtion of perpetuity was not before him. *Scattergood* v. *Edge*, and the other caſes, in which the number of the lives is treated as immaterial, are open to the ſame obſervation. The circumſtances of thoſe caſes afford no ground for thoſe expreſſions. It is impoſſible to ſuppoſe, Lord *Nottingham*'s idea in *The Duke of Norfolk's Caſe* was, that an eſtate ſhall be kept unalienable during any number of lives the teſtator chooſes, provided he ſtops at lives in being. He built his deciſion very much upon the reaſon and convenience of the thing. His expreſſions are very happily applied to this will. It cannot poſſibly be imagined, that ſuch a diſpoſition as this could have been in his mind, or that he would have ſupported it. How are theſe *Dicta* properly to be underſtood? As the *Dicta* of Judges ought always to be underſtood, with reference to the caſe and the queſtion before them. There is no inſtance of a limitation either in its object or effect bearing the leaſt reſemblance to this. The Judges in deciding theſe queſtions certainly have not in words fixed any particular number of lives; neither have they fixed any number of years. Why not? Becauſe they looked to the caſe before them, which in general has been a limitation to take effect after a life, or a life and twenty-one years. They looked no farther. They never thought, ſuch an attempt as this could be made.

Therefore

Therefore they never thought it neceſſary to reſtrain the number of lives; but they expreſſed generally lives in being; certainly not at all adverting to ſuch a caſe as this. If any ſuch attempt had been made at an earlier period, it is impoſſible not to conclude from the reaſoning againſt all theſe limitations, that a preciſe rule would have been laid down to prevent the miſchief. Lord *Nottingham* muſt have had an idea of that ſort in his mind. He muſt have conceived, there would be ſome attempt of this nature; and that, when it ſhould appear, the miſchief would be checked. There is much good ſenſe in what he ſays; that he will ſtop, when any inconvenience appears; meaning certainly not merely an inconvenience in his own mind, but that ſort of inconvenience, aiming at a perpetuity, upon which no perſon can doubt. When the miſchief ariſes, that is the time to create the check. There is a great difference in ſaying, a Judge *ex arbitrio* is to ſtop on account of any idea of inconvenience in his own mind, and that, where a general inconvenience appears, aiming to defeat the Law, he is not to ſtop on account of theſe *Dicta*; which are the whole foundation of the argument. It is extraordinary, that, when perpetuity is the ſubject, it ſhould ever fall from rational and thinking men, that there is no difference between a thouſand lives and one life. Suppoſe, a purchaſer was to be told, he was to give the ſame price for an eſtate for a thouſand lives and for one life! What is meant by perpetuity? What is the wiſdom of the Law, if the object of this will is to take place? The Law abhors a perpetuity; and will not ſuffer the fee of an eſtate to be kept unalienable: but it will ſuffer it to be unalienable for ſuch a number of lives as to make a period of above a hundred years almoſt certain. The fee is worth nothing after twenty lives. It is ſaid, one life may endure to the age of *Parr* or *Jenkins*: but the Law looks to what uſually happens in the common courſe of affairs; and does not conſider it worth while to advert to ſuch rare inſtances. This caſe will be made a precedent; and it is not unlikely, that within ten or twenty years this Court will have to decide upon another will of the ſame nature.

It may be aſked, what is the Court to do, if not to follow theſe *Dicta*? It is not difficult to find the rule. Look, not to what the Judges have ſaid, but to what they have done. See, how far the deciſions have gone; and do not go beyond that.

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Tried by that teſt this caſe is totally unlike all, that have preceded it, with different views and objects in every way, in which it can be conſidered; and it is impoſſible not to ſee, that it never would have been tolerated by the Judges, to whoſe *Dicta*, not deciſions, your Lordſhip is referred in ſupport of it. In no inſtance have they gone beyond two or three lives; not keeping the property from poſſibly veſting in ſome one even in a very ſhort period. Even in *Hopkins* v. *Hopkins*, in which the ſuſpenſion might by poſſibility have continued longer than in any other caſe, that has occurred, the eſtate might have veſted immediately after the death of the Teſtator; for *John Hopkins* might have had a ſon; in whom it would have veſted; and all the Executory Deviſes would have become Remainders. No ſuch concluſion, that an eſtate may be prevented from veſting for any number of lives, can be drawn from that caſe; and no caſe has gone farther. Suppoſe, that caſe was an authority for keeping an eſtate unalienable for three lives; and for preventing all enjoyment of it for the ſame period: does the conſequence follow, that your Lordſhip ſhall eſtabliſh a ſuſpenſion of alienation and enjoyment for a thouſand lives? It is effectually and ſubſtantially doing that, which all the caſes ſhew the Judges have been perpetually labouring to prevent, the creation of a perpetuity.

Lord Chancellor.—Did not the caſe of *Humberſton* v. *Humberſton* go much farther? There were according to the Report fifty lives.

Reply.—Yes: but the eſtate was not kept, as by this Will, from going to any one. There was no Executory Deviſe. There were limitations in remainder to ſeveral perſons in being: but the defect was, that the Teſtator attempted to give eſtates for life to ſons of future ſons inſtead of giving to the future ſons eſtates tail; which was done by the Decree.

It has been argued from that caſe, in favor of the two grandſons of the Teſtator born ſince his death, that the intention ought to be executed *Cy pres.* That doctrine, as applied to this caſe, is totally new. If ſuch an application of it is well-founded, neither in this caſe nor any other upon this queſtion could any doubt ariſe. But the Court have never ſaid, they will make the Deviſe good, as far as they can; but, that a Deviſe, the Law will not ſupport, muſt fail. In the common caſe of a limitation over of perſonal eſtate after a death without iſſue, if the doctrine of *Cy pres* can be applied, the Court would always have ſaid, they would make it good as near to the intention as they could; and all Teſtators mean iſſue living at the death: but no ſuch deciſion has ever been made; and wills after wills have been overturned upon that point. In this caſe the application of the doctrine of *Cy pres* would totally change the ſubject given, the object to take, and the time of taking. This property with the accumulation is given to a perſon anſwering a certain deſcription at the end of nine lives. Can the period be changed? Can the Court give the acumulation for ſeven lives inſtead of nine, and take an object at the expiration of the ſeventh life? The doctrine of *Cy pres* has never been applied in this Court but to caſes of Charity (*a*); and in thoſe caſes it has been applied far enough. *Humberſton* v. *Humberſton* does not bear upon this. The Court did no more in that caſe than a Court of Law would do, no more than was done in *Chapman* v. *Brown*. The intention there was obvious. The Court took the words certainly not in the ſenſe the Teſtator meant: but they gave an eſtate-tail; by which they effectuated the main intention of the Teſtator, upon a ſimilar principle to that, upon which the Court of King's Bench decided the well-known caſe of *Robinſon* v. *Robinſon* (*b*); in which notwithſtanding the words "*and no longer*" annexed to the eſtate for life, the Court held, they might eſtabliſh it as an eſtate-tail, upon the main intention, that the eſtate ſhould not go over ſo long as there was any iſſue. No caſe applies to this, no rule of Law; and no argument can diſprove, not only that there is danger of a perpetuity, but that there is an actual perpetuity. There is nothing in ſupport of it but theſe *Dicta*; which ought to be referred to the caſes themſelves, and not to a caſe like this.

Next, as to the accumulation. It is impoſſible to look to that, as coupled with the limitations, and intended to endure

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(*a*) See *Attorney-General* v. *Boultbee*, *Attorney-General* v. *Whitchurch*, *Attorney-General* v. *Andrew*, *Attorney General* v. *Bowyer*, *ante*, vol. 2. 380. vol. 3. 141, 220, 633, 714. The ſame doctrine has been applied to appointments: as to which ſee *Pitt* v. *Jackſon*, 2 *Bro. C. C.* 51. *Briſtow* v. *Warde*, *Routledge* v. *Derril*, *ante*, vol. 2. 336, 357.

(*b*) 1 *Bur.* 38. 3 *Atk.* 736. *ante*, vol. 2. 225.

for ſuch a length of time, without ſeeing the enormous inconvenience. It is ſaid, that a power to reſtrain alienation implies a power to accumulate for the ſame time. That certainly is not a neceſſary conſequence; and no caſe is to be found, in which it is eſtabliſhed. At the ſame time it muſt be admitted, there are caſes, which ſeem to imply, that during the time an eſtate is kept unalienable the profits may accumulate: but there is no authority for taking any number of lives, as in this will, totally unconnected with the enjoyment of the property, merely for the purpoſe of accumulation; and the caſes referred to are far from proving, that any ſuch attempt was ever thought of, or that any thing has fallen from any Judge to warrant accumulation of ſuch an enormous duration. *Phipps* v. *Kelynge*, before Lord *Camden*, is ſo ſhortly ſtated, that the circumſtances cannot be exactly collected: but it is obvious, that certain leaſehold eſtates muſt have been accumulating for ever, if the Court had not found out ſome time, at which it was to ſtop. Lord *Camden* ſaid, it muſt ſtop, where any future limitation muſt ſtop; when any unborn perſon attains the age of twenty-one. To reaſon from that caſe, that there may be ſuch an accumulation as is now contended, is open to the obſervations made upon the other queſtion, and the caſes cited upon that; for it muſt be remembered, that accumulaion may go on for all the lives, that can poſſibly be put into a will, if it can continue during theſe nine lives. *Stephens* v. *Stephens* affords no inference in favor of accumulation. It was there determined, that an eſtate may be kept unalienable for a life in being and twenty-one years afterwards: that is, it need not veſt in an unborn child till the age of twenty-one. That does not neceſſarily keep the eſtate unalienable for twenty-one years; though it is ſo conſidered. In *Hopkins* v. *Hopkins* the intermediate rents and profits were held to belong to the heir at law. That ſhews only, that the queſtion was agitated. The caſe upon Lady *Deniſon*'s will does not apply. There, as in many caſes, the eſtate was limited to an unborn ſon, a ſecond ſon of Miſs *Midgeley*, with a direction, that till ſuch ſon ſhall attain the age of twenty-one, the profit ſhall accumulate. If accumulation is allowed in any degree, it is impoſſible to ſay, it may not go ſo far. Miſs *Midgeley* might have had a ſecond ſon within two years after the death of the Teſtatrix. The accumulation therefore was not neceſſarily to continue longer than twenty-three years; but it might by poſſibility continue during the life of Miſs *Midgeley*, and beyond that, till a future ſecond ſon ſhould attain the age of twenty-one. Is that an argument for allowing *ex neceſſitate* an accumulation for five thouſand lives, or as many as the imagination can frame, that can poſſibly be ſo purſued, that it may be known, when they ceaſe to exiſt? The accumulation under that will has gone as far as moſt caſes. No caſe has gone farther. In *Gibſon* v. *Lord Montfort*, upon the celebrated will of Mr. *Shepherd*, the accumulation could not have continued longer than for the life of Mis *Shepherd*; and the moment a child was born the eſtate veſted, liable to open upon the birth of other children. How monſtrous it would be from that to draw an inference in favour of this accumulation! I do not preſs the amount of the property. The only difference upon that is, that the conſideration of the effect of the accumulation of a very large fortune brings the danger of great accumulation to the minds of thoſe, who are to conſider it, in a different way from a moderate accumulation upon a ſmall ſum.

It may be fairly ſtated, that this queſtion has never been conſidered; for all the inſtances to be found are for a very ſhort time, at the utmoſt a life and the poſſible addition of twenty-one years. The enormous conſequences of the accumulation aimed at by this will never entered into the imagination of the Judges: otherwiſe is is impoſſible, that the inconvenience ſhould not have been diſcuſſed. The whole doctrine of accumulation is of a very late date. There is no inſtance farther back than the *Reports* of *Foreſter*, and one or two in *Peere Williams*. The reaſon is obvious. It could not occur, where the eſtate was limited for life; nor where there was a fee upon a fee. I believe it never occurred, till perſonal property came to be the ſubject of theſe remote limitations. Lord *Hardwicke* obſerved upon Mr. *Shepherd*'s will, that, where the property is given as a reſidue, as one maſs, there muſt be accumulation, becauſe the profits belong to the maſs. After the doctrine had ariſen, it was by degrees applied to real eſtate; and ſo it has reached the ſtate, in which we now find it. If I am aſked, where it is to ſtop, I anſwer, look to what has been decided: accumulate as far as your predeceſſors have accumulated; go no farther. What uncertainty can ariſe from that? If accumulation has taken place for one or for two lives, let it go ſo far. What makes the law? The deciſions; what the Judges do; not looſe *Dicta* thrown out in argument; which the caſes before them do not neceſſarily call for.

As to the words of the reſtrictive clauſe "*born in due time afterwards*," it is very uncertain, what ſenſe is to be given to them, ſuppoſing them to apply to all the claſſes of lives. They are uſed in this will in a ſenſe perfectly new. In the caſe of a father there is a very natural preſumption; and where there is a gift generally to all the children of a third perſon living at his death, it is not a natural conſtruction to exclude a poſthumous child. Unleſs theſe words have a clear and certain meaning, the deviſe is void; becauſe no one can tell, what time was in the Teſtator's contemplation. If they mean children in the womb, he had no power to reſtrain the alienation or enjoyment of an eſtate during the life of a child in the womb; for ſuch child is not a life in being within the ſenſe of the *Dicta*, that are relied on. There is no inſtance, in which an unborn child has ever been conſidered in exiſtence, merely for the purpoſe of keeping property unalienable, where that child is not to take. The metaphorical expreſſion, that *all the candles are lighted together*, and the other expreſſion, that all the lives are wearing out at the ſame time, apply to lives actually in being, ſubject to all the caſualties of life. Upon this ſuppoſition the life begins to wear out, before it begins to exiſt. Was it ever imagined, that under an Act of Parliament or a leaſing power a child in the womb might be deſcribed as one of the lives? It is a ſtretch of the words, that has never yet been made. This very clauſe of this will negatives ſuch a conſtruction by uſing particular words to deſcribe poſthumous children. I admit the caſes, that have been cited to ſhew, that ſuch a child is conſidered as in exiſtence under certain limitations, and for ſome purpoſes, for its benefit. Accordingly in many caſes it has been held capable of taking by deſcent; and why not by purchaſe, I do not know; except that in *Reeve* v. *Long* all the Judges held, that it could not; which produced the *Statute*. That ſuch child may take for its benefit, *Wallis* v. *Hodſon*, cited by Mr. *Cox*, is a direct authority. Lord *Hardwicke* there ſtates the rule of the Civil Law, and how it came to be adopted in this Country. The paſſage cited from *Domat* proves preciſely the ſame thing: an infant *en ventre* may be heir or executor; becauſe he may take real or perſonal property: it is for his benefit: but he is not compelled; for he may renounce, when he is of age. *Long* v. *Blackall* and *Whitelock* v. *Heddon*, do not prove the contrary propoſition. In the former, if a ſon ſhould be born, the premiſes were given to him: it

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it was decided, that he was capable of taking; and the limitation over after his death was good. It was for his benefit; therefore he might have taken. The latter caſe is exactly to the ſame effect. It proves only, that a child *en ventre* may take an eſtate. How does that prove the propoſition to be proved; that ſuch child is to be conſidered a life in being for all purpoſes; for it muſt be ſo, if he is ſo conſidered for this purpoſe? The doctrine, that ſuch a child may be vouched, is curious: but there is good ſenſe in it. The perſon to be vouched is the heir of the warrantor; and no other perſon can be the actual heir, till it is known, whether ſuch child will come into being. It will not eſcape Your Lordſhip, that every particular inſtance, ſhewing, that a child *en ventre* is to be conſidered as in being for particular purpoſes, proves, that, it is not to be ſo conſidered for all purpoſes. It muſt be implied, that for many purpoſes and many conſiderations it is to be conſidered not in being. Is there any reaſon, why Your Lordſhip ſhould go beyond any deciſion, you can find, to conſider ſuch a child in being for the purpoſe or ſupporting theſe limitations and this accumulation?

Upon the whole this will is bad, as falling within no deciſion, rule, or principle; being founded entirely on looſe *Dicta*. If Your Lordſhip eſtabliſhes it, you will do that, which has never been done before. You will create a real perpetuity; for, as no diſtinction can be made between the number of lives taken by this will and any number of lives, Your Lordſhip will make an example, by which an actual perpetuity may be created, extending according to every calculation to a Century at leaſt, probably to 120 years; to which may be added a contingent minority. It will produce very dangerous conſequences. The freedom of Election, the general effect upon the property of the country, theſe conſiderations will weigh with Your Lordſhip againſt eſtabliſhing a precedent unlike any thing, that has been done by Your Predeceſſors. If any caſes like this can be found, this muſt follow them: if none, that in any view of it come near to this, the looſe *Dicta* ſcattered through the Books will not be ſufficient to ſupport ſo unreaſonable and monſtrous a will.

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Lawrence, Juſtice, after particularly ſtating the caſe, proceeded thus:

The part of the will, on which the queſtion in this caſe ariſes, is ſhortly this.

It is a Deviſe and Bequeſt by Mr. *Thelluſſon* to his Truſtees and Executors of his real eſtates and the *reſiduum* of his perſonal eſtate, upon truſt to lay out the perſonal eſtate, and the accumulated profits, which may ariſe from his original and the after-purchaſed eſtates, during the lives of his three ſons and ſuch of their iſſue as ſhall be living at the time of his death or born in due time afterwards, in the purchaſe of real eſtates, and on the death of the ſurvivor of the ſeveral perſons, during whoſe lives the accumulation is directed to go on, to divide the deviſed and purchaſed eſtates into three parts, and to convey them reſpectively in tail male to the eldeſt male lineal deſcendant of his three ſons, with croſs remainders; and if there ſhall be but one ſon, then to him in tail male; and in caſe there ſhould not be any ſuch male lineal deſcendant, then upon Truſt to ſell the ſame, and pay the money ariſing from thence to His Majeſty for the benefit of the Sinking Fund.

Upon this caſe the objections, which have been made to the diſpoſition of Mr. *Thelluſſon*, are reducible to three heads.

The Firſt is, that by his will he has exceeded the limits, within which the contingency muſt happen, upon which Executory Deviſes are permitted to take effect.

The Second is, that the doctrine of Executory Deviſes is not applicable to the purpoſe of a truſt of accumulation, whoſe object is to ſeparate the enjoyment of the eſtate from the perſons, during whoſe lives it is unalienable.

The Third is the ſuppoſed uncertainty of the perſons, who are the objects of the beneficial truſts, after the determination of the period of accumulation.

As to this laſt objection, it does not appear to me, that the time is arrived, that makes it proper for diſcuſſion. The poſſibility,

that

that a queſtion may ariſe between perſons claiming as the next male lineal deſcendants of the Teſtator's ſons, is not, as I apprehend, a ground for the Court's refuſing to take care, that the truſts be properly executed, if under any circumſtances a claimant may exiſt, about whoſe right there can be no doubt. In the courſe of the reply it was admitted, that there may be a perſon, who will anſwer the deſcription of eldeſt male lineal deſcendant of ſome one of the ſons; and who will unqueſtionably be entitled to take the whole; and, as the Attorney General has ſaid, the three ſons may die without any male lineal deſcendant; in which caſe the Crown will take. Therefore, without ſaying any thing as to this objection but that I think it premature, I ſhall proceed to conſider the others.

The firſt objection has been divided into ſeveral heads:

The Firſt of which is, that the words of reſtriction in Mr. *Thelluſſon*'s will, viz. "*as ſhall be living at the time of my deceaſe*, "*or born in due time afterwards*," are according to juſt conſtruction to be confined to the laſt claſs of perſons, during whoſe lives the accumulation is to be; and cannot according to the rules of conſtruction be carried back to any of the prior claſſes; the conſequence of which will be, that the eſtate will be unalienable during the lives of the iſſue of his ſons and grandſons, though born long after his death.

Another head of this firſt objection is, that according to the doctrine of Executory Deviſes an indefinite number of lives though they be concurrent, cannot be taken, to protract the time, during which the eſtate is unalienable, from the manifeſt inconvenience, that will reſult; and that the number aſſumed by Mr. *Thelluſſon* is ſo great as to have that conſequence.

A third head, into which it is branched, is that by the words "*born in due time afterwards*" the Teſtator has added lives not *in eſſe* at the time of his death to the lives of perſons *in eſſe*; and that on that account the truſts are void, if the reſtrictive clauſe ſhould be conſtrued as extending to all the previous claſſes.

The laſt head of this firſt objection is, that the accumulation by the directions of the will is to continue beyond the duration of all theſe lives, and is to go on, until eſtates are actually purchaſed, divided, and conveyed, to the perſons entitled under the Truſts of the Will; and that on this ground the Truſts, ſo far as reſpects the perſonalty, are void.

This laſt branch of the firſt objection was not much preſſed by the gentleman, who made it, nor inſiſted on in the reply. If the will is atended to, there does not appear to me any ground for it. The Teſtator directs the accumulation and the purchaſes to be made therewith to go on during the lives of the ſeveral perſons deſcribed in the will and of the ſurvivor; and after the death of the ſurvivor he directs a partition to be made, and a conveyance to be made of one third part to the uſe of the eldeſt male lineal deſcendant then living. The obvious meaning of this is, *living at the deceaſe of the ſurvivor*. The Teſtator directs the accumulation to go on during the lives only, and without any interval of time after the death of the ſurvivor directs the partition and conveyance to be made; and though ſome time muſt be employed in the partition and conveyance, that will not prolong the truſt of accumulation, or the time, during which the eſtate is locked up; for upon the death of the ſurvivor the intereſts of the perſons to take will become veſted in them, and be diſpoſable by them.

The intention of a Teſtator, if clear and conſiſtent with the rules of Law, is to govern, without regard to the grammatical conſtruction, or whether it deſerves favor, or not.

As to the firſt head of this objection, that the words of reſtriction are to be confined to the laſt claſs of perſons, and cannot be carried back to the prior claſſes, it has been rightly admitted, that, whatever may be the ſtrict, grammatical, conſtruction of the words of a will, that is not to govern, if the intention of the Teſtator requires a different conſtruction; and this has been rightly admitted; for there can be no rule better eſtabliſhed, than that in the conſtruction of wills the intention of the Teſtator is to govern, if that intention be conſiſtent with the rules of Law; and every inaccuracy of grammar and every impropriety of terms ſhall be corrected, if that intention be clear and manifeſt (*a*); and this rule of conſtruction holds in all caſes; whether the teſtamentary diſpoſition be ſuch as a Court will favor, or the contrary. In ſome caſes, as in the caſe of creditors, an intention in the Teſtator ſhall be inferred from the purpoſe of his deviſe beyond what may

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(*a*) 3 *Burr.* 1634.

may be collected from any thing he has ſaid in expreſs terms: but where the Teſtator's intention is certain and clear, however undeſerving it may be of favor in a Court of Juſtice, I know of no authority for ſaying, that the will ſhall receive a conſtruction to defeat ſuch intent, becauſe it is odious and not to be favored. If we look for the intention of the Teſtator in this caſe, I think, there can be no doubt that it was, that his property ſhould be kept unalienable for as great a length of time as it could by Law, in order that the produce of it's accumulation at the end of that period might be tranſmitted to three of his male deſcendants. To effectuate this intention it was neceſſary, that the accumulation ſhould not go on during the whole of the lives, unleſs narrowed by the reſtrictive clauſe. Without that his intent will be defeated. For what purpoſe could the reſtriction be introduced at all, but to prevent a conſtruction, that would defeat his intention; and if it was done with that view as to one claſs, it would be ſtrange to ſuppoſe, he meant to confine it to that claſs, when the reaſon for introducing it applies equally to the others (*a*). It has been aſked in the argument, how can the Court know, the Teſtator did not intend to uſe the firſt deſcription of perſons in it's moſt extended ſenſe. It certainly is a ſenſe, which the words will bear: but ſurely it is not reaſonable, that the Court ſhould adopt that conſtruction, which will defeat the will, and give to his heir at law and next of kin what it was moſt unqueſtionably his intention that they ſhould not enjoy. Read this will with reference to the rules of Law, and there can be no doubt; and it is a rule, that, where words are capable of a twofold conſtruction, even in the caſe of a deed, and much more in the caſe of a will, ſuch a conſtruction ſhall be received as tends to make it good (*b*). The true conſtruction of the ſentence is to refer the words, "*as ſhall be living at the time of my deceaſe or born in due* "*time afterwards*," to every perſon deſcribed in the ſentence, who was not *in eſſe* at the time of making the will. To all of them they are applicable, and to no others with any propriety of language; and the adding the reſtriction after the enumeration of the laſt claſs was not becauſe it was intended to apply to that only, but in order to avoid the frequent repetition of it.

If words are capable of a twofold conſtruction, the rule is to adopt ſuch as tends to make it good, even in the caſe of a deed, much more of a will.

The two remaining heads, into which this objection has branched, are more conſiderable.

(*a*) 1 *Sand.* 60. (*b*) 3 *P. Will.* 260.

The firſt is, that an indefinite number of lives or claſſes of lives cannot be taken to poſtpone the veſting of the Executory intereſt; as it would lead to this monſtrous propoſition, that an eſtate might be made unalienable during the lives of all the Members of both Houſes of Parliament, of all the Deans and Chapters in the Kingdom, and in ſhort for any number of lives, the duration of whoſe continuance could be by any means aſcertained; and in ſupport of this objection an expreſſion has been much relied on of Lord *Nottingham* in *The Duke of Norfolk's Caſe*; who to the queſtion, where he would ſtop, if not at the line drawn in *Child and Bayley's Caſe*, anſwered, that he would ſtop, wherever any viſible inconvenience appeared. But however monſtrous ſuch doctrine may appear at firſt ſight, I find no authority for deciding, that there cannot be an indefinite number of concurrent lives; and that there is any limited number, the going beyond which will be inconvenient. In *Love* v. *Windham* it is laid down, that a Term may be limited to one for life; remainder to another for life; remainder to a third; and ſo on to twenty. In 3 *Ch. Ca.* 29. Lord *Nottingham* ſays the ſame thing; that twenty remainders for life in the truſt of a term are good, *becauſe they produce no inconvenience.* In *Scattergood* v. *Edge* the Court laid it down, that an Executory Eſtate to ariſe within a reaſonable time is good; that twenty, nay thirty, years have been thought a reaſonable time. "So is the compaſs of a life or lives; "for let the lives be never ſo many, there muſt be a ſurvivor; "and ſo it is but the length of that life."

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By this expreſſion the Courts cannot be underſtood to have had in view any limited number of lives. If they had, they would never have expreſſed themſelves by a phraſe as comprehenſive as the language affords. In *Robinſon* v. *Hardcaſtle*, 2 *Bro. C. C.* 30. Lord *Thurlow* ſays, a man may appoint 100 or 1000 truſtees, and that the ſurvivor of them ſhall appoint a life eſtate, that would be within the line of a perpetuity.

Where is the difference between the ſurvivor of 1000 appointing a life eſtate, and limiting an eſtate to a Truſtee and his heirs to appoint on the death of the ſurvivor of 1000? If nine lives are too many in this caſe, the Court muſt ſo decide, becauſe it is inconvenient in any caſe to aſſume ſo great a number; for a general rule cannot depend upon the particular circumſtances

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The third head into which the firſt objection is branched, is, that the Teſtator has to the lives of perſons *in eſſe* at leaſt added the lives of perſons *en ventre ſa mere* to prolong the time of accumulation, if he did not mean to go farther; and has by theſe means exceeded the compaſs of a life or lives in being, and twenty-one years, and the fraction of another year for the time of geſtation; which is the utmoſt period allowed for an Executory Deviſe to take effect.

This leads to an inquiry of what the Teſtator meant by the words "*in due time afterwards.*" And to ſupport this laſt head of objection this expreſſion has in the courſe of the argument been conſidered as meaning the time of geſtation, or, perhaps, the period of twenty-one years. In arguing this point great learning and ingenuity have been ſhewn in tracing the Hiſtory of Executory Deviſes, in inveſtigating the foundation of the rule determining, how remote the contingency may be, on which they may take effect, and in diſcuſſing the caſes to be found on the ſubject. But according to what I conceive to be the true meaning of this expreſſion, it is not neceſſary at this time to enter into a conſideration of theſe matters. The words "*in due time* "*afterwards*" are words of relation. The time muſt be due, that is, fit and proper, in reſpect of ſome matter or thing, to which they may be referred: but what that is has not been in terms pointed out by the Teſtator, and is to be collected from what may appear to be the general purpoſe of the will. When a man ſpeaks of the children his wife may bear, the obvious meaning of thoſe words is the time of geſtation; as he can have no children born of her in due time after his death, who are not brought forth within that time. But the ground, upon which that meaning is to be inferred, does not exiſt, when a man ſpeaks of the children of another perſon. There is no time, which is undue for ſuch children to be born with reference to himſelf. They are not born leſs in due time after his death from coming into the world at the end of twelve or eighteen months, or more, than if born within a leſs period than nine months. If however it can be collected from the will, that the Teſtator from analogy to the uſe of that expreſſion by parents meant to deſcribe the period of geſtation, it may very well be ſo underſtood. But I do not ſee any thing, from which it neceſſarily follows, that the Teſtator in this caſe meant a period of nine months or twenty-one years after his death; and I do not think either the true conſtruction. The conſtruction I put upon the words "*in due time*" is to underſtand thoſe words as meaning to deſcribe that period, during which perſons may come *in eſſe*, for whoſe lives according to Law the accumulation may go forward: juſt as if the Teſtator had ſaid, upon truſt during the lives of ſuch iſſue of my ſons as ſhall be living at the time of my death, and of ſuch iſſue of my ſons as ſhall be born within ſuch time after my death, as that the continuance of the truſt during their lives may legally ſubſiſt. In ſupport of this conſtruction, in that part of the will, which directs, how the preſentation to the living of *Brodſworth* ſhall be made, he points out a rotation, according to which each of his male lineal deſcendants ſhall nominate, if he be capable by Law of making ſuch nomination, when the Church becomes vacant, "*or* "*in due time afterwards*." There he could only mean ſuch time as is by Law allowed for the Patron to preſent. So in the part of the will under conſideration the words "*born in due time after-*

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“ *wards*” mean, born ſo ſoon after his death as to make an accumulation during their lives legal. This conſtruction is conſiſtent with the general intention of the Teſtator; whoſe will in this reſpect is, I think, ſhortly this: “ Let the produce of my real “ and perſonal eſtates accumulate for the lives of as many of my “ deſcendants as the Law will admit: with the accumulation I will “ that lands be bought; and on the death of the ſurvivor of “ thoſe perſons, for whoſe lives the accumulation may go on, “ let thoſe lands and thoſe I ſhall die ſeiſed of, be divided into “ three equal parts, to be ſettled in tail male on the eldeſt male “ lineal deſcendants of my three ſons.”

In this way of underſtanding the will the eſtates will be diviſible upon the death of the Survivor of the perſons, who were living at the time of the Teſtator's death, if by Law the accumulation can go on no farther: but if it can, then the accumulation may go on during the farther time of ſuch lives as the Law will allow. But it will be time enough to decide that caſe, if the infants, who were unborn in the Teſtator's lifetime ſhall ſurvive thoſe, who were then in exiſtence. If thoſe infants ſhould die before them, that queſtion will not ariſe.

The remaining objection, that the doctrine of Executory Deviſes is not applicable to a Truſt of accumulation, has been argued from the analogy of Executory Deviſes to Contingent Remainders, and on the impolicy and inconvenience of permitting property to be withdrawn from circulation for ſuch a length of time; eſpecially, when the tendency of it is to create a fortune too large for any ſubject to poſſeſs with ſafety to the ſtate. As to this objection it cannot but be admitted, that in a variety of caſes, which have happened, the Court has had occaſion to conſider the effect of accumulation ariſing from Executory Deviſes; and although in many of the caſes alluded to, as upon the Wills of Mr. *Hopkins*, Mr. *Shepherd*, and Lady *Denniſon*, thoſe Truſts might have been carried on for ſo great a length of time as to furniſh a poſſibility of exceeding great accumulation, the objection which is now inſiſted on, never ſtruck the Court. A very large fortune may have ſuch miſchievous conſequence, by being locked up for three lives; to which extent the caſes have, I think, been admitted to have gone; and a very ſmall fortune for many more lives will produce no accumulation, that can in any degree have ſuch effects; and

I think, it muſt be concluded, that the number of thoſe, which can have ſuch conſequences, muſt be very ſmall. Now, when the conſequences of accumulation will be ſo various, according to the different amount of the property to be accumulated, I do not ſee, how any general rule can be laid down as to the number of lives, founded upon the conſequences ariſing from the duration of the accumulation. This difficulty would exiſt, if no caſes had been decided, from which we may collect, that the line the Court has gone by as to the number of lives, for which accumulation may go on, is, that it may proceed for as many lives as thoſe, during which the eſtate may be unalienable; and that an Executory Deviſe of the growing profits of property, whether real or perſonal, may be beneficially given at the ſame time as the ſubject-matter, out of which they are to ariſe.

In *Gibſon* v. *Lord Montfort* Lord *Hardwicke* ſays, it is admitted, the Teſtator might by expreſs words have given away the ſurplus rents and profits, that ſhould accrue, before the daughter had a child, or died without iſſue, either to ſuch child, when born, or to the perſon to take, when ſhe died without iſſue. "It is plain, he might; becauſe it is to determine in the "compaſs of a life; which is a proper time and reſtriction, "within which ſuch a contingency can happen."

Here Lord *Hardwicke* does not ſay, it was a proper time to permit accumulation, but that accumulation may go on for the time, which is proper for the contingency. In that caſe the contingency was the expiration of a life: but the Law ſays, any number of concurrent lives is a time equally proper for ſuch contingency. So in the caſe of *Phipps* v. *Kelynge* Lord *Camden* declared, that the truſt for accumulating the rents of the leaſehold eſtates, to be laid out in the purchaſe of lands to be ſettled, ceaſed and became void on the ſon's attaining the age of twenty-one; the Law not permitting a leaſehold intereſt to be ſettled unalienably beyond the time of the firſt unborn perſon entitled thereto arriving at the age of twenty-one years; plainly adopting the rule as to Executory Deviſes.

The purpoſe of accumulation no objection to an Executory Deviſe.

After theſe determinations, which may be found as to the diſpoſition of accumulated profits, ſurely it is too late by reaſoning from analogy to Contingent Remainders, and the particular purpoſes, for which Executory Deviſes may have been firſt introduced, to impeach an Executory Diſpoſition of property, becauſe the enjoyment of the ſubject is not given to the perſons, during whoſe lives it is to accumulate; and, becauſe the tenant of a particular eſtate is entitled at Law to the rents of it, to conclude from thence, that the accumulation, till the contingency happens, cannot be given by Executory Deviſe to the perſon, who upon the contingency is to take the thing, from whence the accumulation is to ariſe. The great objection to Executory Deviſes is their tendency to a perpetuity; and that is the inconvenience, againſt which it was thought neceſſary to guard by the reſtrictions to be found in our books. But the tendency to a perpetuity is not increaſed by giving the intermediate profits with the ſubject, which produces them. The value of the thing deviſed is enlarged, but not the time, which the Law has allowed for keeping it unalienable; and with reſpect to what may or may not be the value of the thing our books are ſilent.

It ſeems to me however to be taken for granted, that more miſchief will happen from the reſtraint as to the enjoyment of the eſtate than will ariſe. The rents and profits are directed to one channel: but it does not follow from thence, that they will not produce all the advantages of circulation in as great a degree, as if the ſeveral perſons, for whoſe lives they are to be accumulated, were to ſpend them. Whatever money is laid out in land will be uſed and employed by the ſeller in ſome one or more of the ſeveral purpoſes, to which it is applicable: if laid out in the Funds, it will go to the exigences of the State, or be circulated and ſpent by the ſtock-holder, who ſhall part with his ſtock, becauſe he wants ſpecie. The ſame thing will be done by the mortgagee, if the accumulated rents are laid out on landed ſecurity. What difference can it make to the community, whoſe hand diſtributes them; whether the owner of the land, or others, who receive them from him? If the rents and the intereſt of the perſonalty were locked up in an iron cheſt, and were unuſable by any one, I ſhould feel great weight in the argument.

As to the objection from the immenſe fortune, that may be raiſed, that is an argument, which will lead to a much wider field for diſcretion than has ever been taken by any Court acting in a judicial capacity. It is not certain, that the accumulation will go on ſo long as to produce ſo miſchievous a fortune; and, if it were ever ſo probable, what means has a Court for deciding on the extent of the fortune, which a ſubject of this kingdom may be permitted to poſſeſs; and by what rules, and by what deciſions is the Court to govern it's diſcretion? It is no ſmall encouragement to the induſtry of the Inhabitants of this Country, that what they may acquire by that induſtry they may diſpoſe of, as they pleaſe, to be enjoyed at what time they pleaſe, ſo as it does not exceed the time, which has been limited by Law. If the Court can ſay, this accumulation ſhall not go on, becauſe it will produce more than any ſubject ſhould poſſeſs, might they not with as much reaſon refuſe to execute a truſt of large property already accumulated in favor of an individual, becauſe it is too much for one perſon to poſſeſs, and direct it to be divided between the next of kin? If there really is a ground to apprehend a miſchief of this ſort, the remedy muſt flow from another ſource.

For theſe reaſons, which are with great deference ſubmitted to your Lordſhip, I am of opinion, the Will ought to be eſtabliſhed.

Buller, Juſtice.—Whether our predeceſſors acted wiſely or unwiſely in the line, they took in adopting the rules as to Executory Deviſe, is not now the queſtion; for the rule allowing any number of lives in being, a reaſonable time for geſtation, and twenty-one years, is now the clear Law, that has been ſettled and followed for ages; and we cannot ſhake that rule without ſhaking the foundations of the Law. This mode of limitation is more in uſe than conveyance by Common Law feoffment; and it is to be favored; becauſe it aſſiſts men in the diſpoſition of their property, and in providing for their relations better than they can otherwiſe do. As a matter of Hiſtory or curioſity an inquiry into the origin of the rule may be the amuſement of a leiſure hour: but it will not afford any aſſiſtance in the deciſion of a Court of Juſtice.

The rule as to Executory Deviſe allowing any number of lives in being, a reaſonable time for geſtation, and twenty-one years, is now the clear law.

The firſt part of this Will objected to is the Deviſe during the lives of the Teſtator's ſons and grandſons and their iſſue to the Truſtees and their heirs. To this clauſe various objections were taken.

Firſt, That limitations for ſo many lives for the purpoſe of accumulation are void.

Secondly, That it is uncertain, who are meant by the words "*born in due time afterwards*."

Thirdly, That a Deviſe for the life of a child *en ventre ſa mere* is void.

Fourthly, That the words extend to all Grand-children and Great-grand-children; be they born, when they may.

The purpoſe of accumulation no objection to an Executory Deviſe.

Upon the firſt of theſe objections it was not contended, that a Deviſe for any number of lives is not good in Law: but it was inſiſted, that the Deviſe is void in this caſe from the purpoſe of accumulation. If the eſtates had been limited to each of theſe perſons for their uſe for life, and after their deaths to their children born or *en ventre ſa mere* at the Teſtator's death, it ſeems to be admitted, that it would have been good: but the purpoſe of accumulation was relied on as making it void. If an authority was wanting to prove, that a Deviſe for a number of lives is good, the caſe of *Doe* v. *Horton* in the Court of King's Bench in the laſt Term is an authority for that purpoſe. Though the limitation was very complicated, and remainders were limited over to unborn perſons after the deaths of unborn perſons, no objection was made. No authority, that was quoted, ſhews, that the purpoſe of accumulation makes this Deviſe void. On the contrary every caſe, that was mentioned, is an authority againſt that propoſition. In *Hopkins* v. *Hopkins* there was an accumulation from the birth of the Deviſee till his age of twenty-one. In *Stephens* v. *Stephens* the intermediate rents and profits between the death of the grandſon and the veſting of the eſtate under the ſubſequent limitation paſſed by the reſiduary clauſe. *Rogers* v. *Gibſon*, *The Duke of Bridgewater* v. *Egerton* (*a*), and *Chapman* v. *Bliſſet*, are all authorities for accumulation of real eſtate; and in ſome of them from the death of the Teſtator. As to perſonal eſtate, *Atkinſon* v. *Turner* (*b*), *Studholme* v. *Hodgſon* (*c*), and *Bullock* v. *Stones* (*d*), eſtabliſh it. The caſe upon Lady *Deniſon*'s will alſo is an authority

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(*a*) 2 *Veſ.* 122. (*b*) *Barnard. Ch. Rep.* 74. (*c*) 3 *P. Will.* 300. (*d*) 2 *Veſ.* 521.

thority as to the principle. It was truly ſtated in the opening by Mr. *Mansfield*, that the queſtion of accumulation was generally conſidered as conſequential upon the limitation of the property. There is no reaſon to ſay, the general underſtanding is not correct. It is incumbent upon thoſe, who contend for the reſtriction, to ſhew, when it ſhall take place. No time has been hinted at ſhort of lives in being. If it is good for three lives, it is equally good for ten, for the reaſon given by Judge *Twiſden*, uſing the phraſe, that all the candles are burning together. It has never been confined to any number of years. Suppoſe, an eſtate had been given to old *Parr*, when an infant in the cradle: it could not be ſaid, when he had attained the age of a hundred years, that he had lived too long; and therefore the intereſt in the eſtate ſhould ceaſe. If a man is permitted to give the eſtate itſelf at a future time, it would be an anomalous caſe to hold, that he ſhould not give the rents and profits in the mean time. Such a rule would be only preſerving the ſhadow and depriving men of the ſubſtantial power to diſpoſe of their property.

Secondly, as to the uncertainty of the perſons intended by the words "*born in due time afterwards.*" Thoſe words can only refer to children in the womb at the death of the Teſtator. The expreſſions accompanying them prove deciſively, that the attention of the Teſtator was called to ſuch deſcendants born in due time afterwards as ſhould be conſidered as living at his death; which a child *en ventre ſa mere*, and ſuch child only, is. It is not the leſs capable of this conſtruction, becauſe he has not uſed the exact words. He means perſons born after his death. They muſt be born in ſuch time afterwards as to be in the ſame ſituation as if they were born at his death. It was argued, that theſe words mean twenty-one years after his death. Upon that conſtruction great ignorance of the Law muſt be imputed to the Teſtator. No ſuch ignorance appears upon the face of the will. This is the firſt caſe, in which it has ever been argued, that we muſt preſume ignorance in a Teſtator, in order to make his will bad. That ſuppoſition, that he is ignorant, and *inops conſilii*, is often made, in order to give a will effect, but never to deſtroy it.

The next objection is, that, ſuppoſing, he meant a child *en ventre ſa mere*, and had expreſsly ſaid ſo, yet the limitation is void.

A child *en ventre ſa mere* may be vouched, may be an executor, may take under the *ſtatute of Diſtributions*, by Deviſe, under a charge for portions, may have an injunction and a guardian.

void. Such a child has been conſidered as a non-entity. Let us ſee, what this non-entity can do. He may be vouched in a Recovery, though it is for the purpoſe of making him anſwer over in value. He may be an Executor. He may take under the *Statute* of Diſtributions (*a*). He may take by Deviſe. He may be entitled under a charge for raiſing portions. He may have an injunction; and he may have a guardian. Some other caſes put this beyond all doubt. In *Wallis* v. *Hodſon*, Lord *Hardwicke* ſays (*b*), "The principal reaſon I go upon in the queſtion is, that "the plaintiff was *en ventre ſa mere* at the time of her brother's "death, and conſequently a perſon *in rerum naturâ*, ſo that both "by the rules of the Common and Civil Law ſhe was to all in"tents and purpoſes a child as much as if born in the Father's "life-time."

In the ſame caſe Lord *Hardwicke* takes notice, that the Civil Law confines the rule to caſes, where it is for the benefit of the child to be conſidered as born: but notwithſtanding he ſtates the rule to be, that ſuch child is to be conſidered living to all intents and purpoſes.

There is another authority, though not a judgment, upon this point; a caſe in the year 1767 upon the Duke of *Norfolk*'s Settlement. Though it is not a judgment, and it never came into diſcuſſion in *Weſtminſter Hall*, yet, I think, it ought to be mentioned to my Lord Chancellor on account of the name of the perſon, under whoſe direction it proceeded. It was a ſettlement drawn by Mr. *Booth*; than whom, I may ſay, no man in his line of the profeſſion poſſeſſed greater ability. By that ſettlement the principal part of the property of that noble Family was ſettled, firſt, upon the preſent Duke and other perſons for their lives, with remainder to the uſe of the firſt child, if a male, whereof *Juliana* —— is now *enſient*, which firſt child, if a male, will be the third ſon of ——, for life, without impeachment of waſte; remainder to truſtees to preſerve contingent remainders; and, after the deceaſe of ſuch child, remainder to the uſe of the firſt ſon of the body of ſuch child and the heirs male of the body of ſuch firſt ſon; and, for default of ſuch iſſue, remainder to the uſe of the ſecond ſon of ſuch child and the heirs male of the body of ſuch ſecond ſon; &c.;

and

(*a*) 22 and 23 *Ch.* 2. *c.* 10. 29 *Ch.* 2. *c.*

(*b*) 2 *Atk.* 117.

and if the firſt child, whereof the ſaid *Juliana* is *enſient*, ſhall not be a male, then to the uſe of the ſecond ſon of ——, *&c.*

The eſtates therefore were limited to a perſon not in being for life, and afterwards to the firſt and other ſons of that perſon in tail-male. *Lancaſhire* v. *Lancaſhire* (*a*) and *Doe* v. *Clarke* go upon the ſame principle. In both a child *en ventre ſa mere* was held to be a child living at the death of the Teſtator. The ſame principle prevailed in *Long* v. *Blackall*, which I ſhall mention preſently; and in *Whitelock* v. *Heddon* it was thought too clear for argument. I am aware, that in *Cooper* v. *Forbes* and ſome other caſes it was held, that ſuch a child will not take as a child living: but, though in *Doe* v. *Clarke* the diſtinction between the caſes, where the bequeſt is in the nature of a portion or proviſion for children, and where it ariſes from motives of perſonal affection, did not quite meet the approbation of the Court, yet thoſe caſes all go upon the ground of affection to perſons exiſting; and therefore it does not comprehend ſuch child. Thoſe caſes were not determined upon an opinion, that ſuch child was not to be conſidered as in exiſtence; for it was for the benefit of the child to be conſidered as living: it came therefore within the rule upon the narroweſt conſtruction: but they turned upon the particular circumſtances of intention; which took them out of the rule. In *Doe* v. *Clarke*, the words "that wherever ſuch conſideration "would be for his benefit, a child *en ventre ſa mere* ſhall be con"ſidered as abſolutely born" were uſed by me, becauſe I found them in the Book, from whence the paſſage was taken. But there is no reaſon for ſo confining the rule. Why ſhould not children *en ventre ſa mere* be conſidered generally as in exiſtence? They are entitled to all the privileges of other perſons. In this caſe it is enough to ſay, ſuch a child is capable of having an eſtate given to him, and conſequently to another perſon for his life. The infant is not hurt, nor is the Law tranſgreſſed, by giving the intereſt to a third perſon any more than by giving it to the infant himſelf.

Upon theſe grounds, I ſuppoſe, Mr. *Hargrave* found himſelf under the laborious neceſſity of attacking the judgment in *Long* v. *Blackall*. It was pretty ſtrongly inſiſted, that in the Court of *King's Bench* that caſe paſſed without much argument or conſideration: but in my opinion it does not deſerve that imputation.

(*a*) 5 *Term Rep. B. R.* 49.

Though

1799. THELLUSSON *v.* WOODFORD.

Though the immenſe quantity of buſineſs, that paſſes through that Court, goes almoſt beyond the bounds of comprehenſion, I, who ſat there near twenty years, can ſay, it is not treated in that manner. I know, the habit of that Court is to deliberate upon the papers as ſoon as they are delivered. Whoever reads what was ſaid by one of the Judges in that Caſe muſt feel, that he was fully maſter of the ſubject, and gave full ſcope to every thing, that could be ſaid; though his ſentiments are expreſſed in few words: "The deviſe over in this caſe muſt take effect, if at all, after a "life, which muſt be in being within nine months after the De-"viſor's death." There can be no doubt, that he felt every part of the caſe. The noble Lord at the head of the Court ſtated the rules and principles, that have been long eſtabliſhed, and are not now denied; from whence he drew the concluſion, that an Executory Deviſe is good, if it muſt neceſſarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of geſtation. Prior deciſions warrant the ſame concluſion. Therefore I give my aſſent to that caſe without any difficulty.

Goodtitle v. *Wood* (*a*) is an authority to the ſame point. The effect is, that there is no difference between a child actually born and a child *en ventre ſa mere*. In *Lancaſhire* v. *Lancaſhire* Judge *Groſe* ſays, "I know of no argument, founded on Law and natural "Juſtice, in favor of the child, who is born during his father's "life, that does not equally extend to a poſthumous child; and I "think, that, when once the Law has interfered, and preſumed in "favor of one child, it would ſtop far ſhort of Juſtice, if it "did not raiſe the ſame preſumption in favor of the other. "The preſumption in favor of the child, who is actually born, "is, that at the time of the father's death he could not intend, "that the will ſhould take effect; or rather that at the time, when "he made the will, he did not intend, that it ſhould ſtand in "the event of his afterwards marrying and having children. Then "the Law, which makes that preſumption in favor of a child born "in the parent's life, muſt make the ſame preſumption in favor "of one born afterwards." He then refers to the Civil Law, and the caſes founded on that Law; and concludes, that a poſthumous child muſt be conſidered in the ſame ſituation and entitled to the ſame benefits as a child born during the life of the parents.

(*a*) 7 *Term Rep. B. R.* 103. note.

This point may be of ſome importance, when we come to conſider the limitations in remainder.

The fourth objection is, that the words extend to grand-children and great-grand-children, be they born when they may.

If the words of the reſtriction relate to each member of the ſentence, that objection vaniſhes. It was truly ſaid, the word "*as*" is a relative word. It refers to the word "*ſuch*" in every member of the ſentence. That word is uſed in every member, that relates to unborn perſons; and it is to be obſerved, the word "*ſuch*" relates to ſome perſons excluſively. It was ingeniouſly contended, that every "*ſuch*" in the preceding members of the ſentence had its relative "*as*;" and therefore the word "*as*" in the laſt member could not refer back to any of the preceding members. But it does not follow, that, becauſe one reſtriction is before expreſſed, another ſhall not be added afterwards. In the laſt member of the ſentence the word "*as*" is twice uſed; and there is no doubt, that there in both inſtances it refers to "*ſuch*;" and ſo with reſpect to the other members. What poſſible reaſon could there be for not uſing the ſame reſtriction as to the other members, that the Teſtator did uſe as to the laſt; even if he was ignorant of the Law: but I cannot ſuppoſe him ignorant, in order to defeat his will. In the original will all the words are put in a parentheſis; which ſhews an entirety of idea (*a*). It would be doing violence to the will to diſunite the parts of the ſentence, which the Teſtator has ſo united. In this caſe to diſconnect the parts of the will would make the will inconſiſtent. Slight circumſtances are ſufficient to qualify and reſtrain general words. Here there is an invincible neceſſity, independent of the words; for the conſtruction diſconnecting the parts of this ſentence would make a will repugnant, which is capable of a rational interpretation. If any one member of this ſentence was void, I do not agree, that it would make the whole void; for Lord *Talbot* ſays in *Hopkins* v. *Hopkins*, in theſe caſes the method of the Courts is not to ſet aſide the intent, becauſe it cannot take effect ſo fully as the Teſtator deſired, but to let it work as far as it can.

Slight circumſtances are ſufficient to qualify and reſtrain general words in a will.

The intention of the teſtator is not to be ſet aſide, becauſe it cannot take effect to the full extent, but is to work as far as it can.

The

(*a*) See *ante*, vol. 3. 95.

The remaining objection is to the direction as to the limitations, when the accumulation has ceaſed. The deſcription of the perſons, who are to take the eſtates, when divided into three lots, is ſaid to be ſo vague, that the Court cannot ſay, who is meant; and therefore muſt reject the whole. If that is ſo, the conſequence muſt follow; though it muſt be obſerved, that with regard to the real eſtate that objection would greatly increaſe the very grievance complained of from the accumulation; for inſtead of being divided between the three the whole would go to one. But if the Court can put a meaning upon the will, however inaccurate it may be, the Court is bound to do ſo. A caſe was put upon the queſtion between a ſon of a daughter and a grandſon of a ſon in the male line; and it was aſked, which of them would be entitled. I ſhould anſwer, the Grandſon of the ſon muſt take; for the Teſtator intended to create an eſtate in tail male in the common uſual mode. We muſt look at the pedigree of the line, that ſprung from him; and the heir male of the Family is the perſon to anſwer the deſcription. It is expreſſed in a blundering way. The firſt blunder ariſes from the ignorance of the perſon, who drew the will, that the words "*heir male*" may be uſed as words of purchaſe. But the next limitation puts it beyond all doubt; for he gives it to the ſecond, third, fourth, and all and every other, male lineal deſcendant or deſcendants; ſo that no younger ſon or deſcendant can take until failure of male deſcendants of the elder. It muſt neceſſarily mean a brother from the words, that follow: "who ſhall be "incapable of taking as heir in tail male of any of the perſons, "to whom a prior eſtate is hereby directed to be limited."

"*Heir male*" in a will may be words of purchaſe.

The clauſe as to the name makes no alteration; and is not applicable to iſſue female. The object was, that the name of *Thelluſſon* ſhould not be ſwallowed up by blending it with any other, as *Thelluſſon Sidney*, or any other great name; but that the name ſhould be *Thelluſſon* only.

The remaining queſtion is, whether the limitations are void, as being too remote? They are to take effect upon the death of the ſurvivor of the *Ceſtuys que vie*. They are then veſted intereſts, however long the time required to make the conveyances may be. We are not embarraſſed in this caſe by any

quaint

The number of contingencies for an Executory Deviſe not material, if they are to happen within the limits allowed by law.

Reaſons for allowing, the ten months and twenty-one years after lives in being to poſtpone the veſting of an Executory Deviſe.

quaint rule requiring a tenant to the *Præcipe*, or as to a contingency upon a contingency. Moſt Executory Deviſes are without any freehold to ſupport them. The number of contingencies is not material, if they are to happen within the limits allowed by Law. Every ſettlement is a contingency upon a contingency. In the ſhort limitation to the heir male of *A.*, if he ſhall have one, who ſhall attain the age of twenty-one, there are three contingencies. It is good, though the heir ſhould not be born under ten months after the death of *A.* If the Law allows that, upon what ground are we not to allow a day before the birth? If that is allowed, ten months muſt be allowed. The reaſon is, that ten months are ſo ſhort a time, that it creates no inconvenience. Judge *Powell* gives the ſame reaſon for allowing it, before the eſtate veſted. The twenty-one years are allowed, becauſe the Law conſiders that time reaſonable. If a limitation after a life, ten months, and twenty-one years, is good, it is incomprehenſible, that a deviſe to an infant *en ventre ſa mere* the day before he is born can be bad.

The two claſſes of caſes decide this queſtion: Firſt, thoſe, I have mentioned, that a deviſe to a child *en ventre ſa mere* is to all intents and purpoſes the ſame as if he was born: Secondly, thoſe, which explicitly ſpeak of the time of geſtation. The firſt caſe, in which I find that, is *Loddington* v. *Kime*; and Judge *Powell* ſpeaks there of a birth previous to the time, at which the eſtate was to veſt. It is true, *Treby*, Chief Juſtice, was of a different opinion; and he thought it ought not to exceed one life. That is clearly not law: but *Powell*'s opinion has been adopted in many caſes. The time allowed for the birth was previous to the time, at which the eſtate veſted; and it was ſo held in *Goodtitle* v. *Wood*. That caſe is alſo an inſtance of the allowance of the time of geſtation, previous to the time, until which the eſtate was ſuſpended; and that caſe is an affirmance of *Powell*'s opinion. The Court have gone further. They have held, that a child *en ventre ſa mere* is to be conſidered as in being. It is immaterial, therefore, whether he is born, or not. If the idea, that a child *en ventre ſa mere* is to be conſidered as in being, is well founded, and the late ſettlement in *The Duke of Norfolk's Caſe*, that I have mentioned, is good, the point is decided. It was never held, that

Executory Deviſes not to be governed by the rules of Law as to Common Law conveyances: but the queſtion is, whether they are to happen within a reaſonable time, or not.

Deviſes are to be governed by the rules of Law as to Common Law conveyances. The only queſtion is, whether they are to happen within a reaſonable time, or not. All, that I ſay, applies to a child *en ventre ſa mere*, as being *in eſſe*, not to any future child. The want of a Tenant to the *Præcipe*, which is the great objection to Executory Deviſe, does not occur in this caſe.

There is another objection, that I ſhall notice, becauſe it was much relied on: *viz.* the double allowance of time for the birth of a poſthumous child. That is not ſo; for the remainder veſts at the inſtant of the death of the ſurvivor of the lives. It is not limited to take effect, when the remainder-man attains the age of twenty-one, but immediately; whether he is an adult, or an infant. In the latter caſe he cannot alien, till he attains the age of twenty-one: but that is by operation of Law: and the deviſe is not affected by legal conſequences.

How the limitations can be conſidered too remote, I do not know. It is not neceſſary, in the way I have conſidered it, to enter into that point.

For theſe reaſons I think, this will ought to be eſtabliſhed.

MASTER OF THE ROLLS.—I ſhall lay out of the caſe the conſideration of two queſtions ſtated by the learned Judge, who opened this caſe, for the reaſons, he gave: Firſt, as to the uncertainty of the perſon to take this property, when the period, during which it it is ſuſpended, ſhall have ceaſed; becauſe that queſtion is not now ripe for deciſion; though, if it were, I ſhould think, it would admit an eaſy anſwer; and I am inclined to concur in the conſtruction of the learned Judge, who preceded me. As to the other objection, that it is not only ſuſpended during theſe lives, but is alſo to continue unalienable, till the purchaſes are made, and the conveyances are executed, that objection would apply to every caſe, in which money is directed to be laid out in land.

There are three principal queſtions. The firſt ariſes upon an objection, which, if well founded, would be deciſive; that according to the true conſtruction of this will the Teſtator has clearly exceeded the utmoſt bounds, within which an Executory Deviſe or Truſt even in the moſt extended latitude has been confined. If he has done ſo, the whole Deviſe muſt fail. This depends upon the true conſtruction of the clauſe requiring the Truſtees to accumulate the rents and profits during the lives of the Teſtator's ſons and grandſons and their iſſue; and the queſtion is, whether the reſtrictive words are confined to the claſs of perſons laſt deſcribed, or refer to all the preceding claſſes, that require the reſtriction?

Before I give my opinion, it is neceſſary to take notice of a moſt novel and dangerous rule of conſtruction attempted to be applied to this caſe; that a will is to be affected on account of the unmeritorious object in the view of the Teſtator. It was very ably and ingeniouſly, but not, I think, ſolidly, contended, that, whatever may be the rule as to wills in general, the Court ought to endeavour to defeat the object of this will, as unworthy of the Countenance of a Court of Equity; and that it is the rule of the Court to adapt the conſtruction of a will to the view of the merit or demerit of the intention. If it is ſuppoſed, that the intention is to be collected in a different manner as to a will, that meets with the approbation of the Court, and a will, that the Court diſapproves, I deny that. I know only one general rule of conſtruction, equally for Courts of Equity and Courts of Law, applicable to all wills; which the Courts are bound to apply, however they may condemn the object; The intention is to be collected from the whole will taken together. Every word is to have its effect. Every word is to be taken according to the natural and common import; and if words of art are uſed, they are to be conſtrued according to the technical ſenſe, unleſs upon the whole will it is plain, the Teſtator did not ſo intend. The Court are bound to carry the will into effect, provided it is conſiſtent with the rules of Law. Another rule muſt be added; that if the Court can ſee a general intention, conſiſtent with the rules of Law, but the Teſtator has attempted to carry that into effect in a way, that is not permitted, the Court is to give effect to the general intention, though the particular mode ſhall fail. That appears from the caſes of *Humberſton* v. *Humberſton*, *Chapman* v. *Brown*, *Pitt* v. *Jack-*

A will is not to be affected on account of the unmeritorious object.

Only one general rule of conſtruction for Courts of Law and Equity applicable to all wills; however the Court may condemn the object: the intention is to be collected from the whole will: every word is to have effect according to the natural common import: words of art to be conſtrued according to the technical ſenſe, unleſs upon the whole will plainly not ſo intended. The Court are bound to carry the will into effect, if conſiſtent with the rules of Law; and if they can ſee a general intention conſiſtent with the rules of Law, but the particular mode is not, though that ſhall fail, the general intention ſhall take effect.

ſon (*a*), and many other caſes; and that may now be conſidered an eſtabliſhed rule of conſtruction.

The rule, that words of reſtriction are to be confined to the laſt antecedent, does not hold even in criminal proceedings.

Apply theſe rules to this caſe. I cannot read this clauſe of the will with a deſire to collect the real meaning of the Teſtator without holding, that he meant to apply the reſtriction to all the Members of it, that ſhould require that qualification. I deny the rule, that it is to be applied only to the laſt antecedent, connected by the word "*and*." It is not ſo even in criminal proceedings; to which, it is ſaid, we muſt compare this: but I deny, that there is ſuch a rule even in criminal caſes. In thoſe, as in all other caſes, the queſtion as to the intention of words of reference muſt depend upon the context. There are two remarkable caſes in the memory of every one, who hears me; the one a capital caſe; the other a caſe upon an outlawry; a caſe, in which the Court is more deſirous of finding objections than in any other; and in that very caſe the objection, upon which the outlawry was ultimately reverſed, was conſidered by many perſons too refined. It is probably anticipated, that the Caſe, I allude to, is *The King* v. *Wilkes*. Even in thoſe two caſes the Court refuſed to miſunderſtand the plain meaning by the application of the words to the laſt antecedent. In *The King* v. *Wilkes*, 4 *Burr*. 2527, upon the Sheriff's return to the writ, that the Defendant was exacted at his County Court "held at the Houſe known by the Sign of the Three Tuns "in *Brook Street* near *Holborn* in the County of *Middleſex*" it was contended, that the words "in the County of *Middleſex*" related to "*Holborn*" only, and not to "*Brook Street*." It was anſwered by Lord *Mansfield*, that it was impoſſible to doubt, whether "*near Holborn*" was not part of the deſcription of *Brook Street*; and that according to the letter, ſenſe, and grammatical conſtruction, of the ſentence, *Brook Street* was deſcribed to be in the county of *Middleſex*.

The other caſe is *The King* v. *Royce*, in the ſame Book, 2073; which it is not neceſſary to ſtate.

Notwithſtanding the argument from the unfavorable nature of this deviſe and bequeſt it is impoſſible to apply this conſtruction to the will without putting upon the words a ſenſe, which no man can conceive the Teſtator intended, Reaſons have been given by

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(*a*) 2 *Bro. C. C.* 51. See *Smith* v. *Ld. Camelford, ante*, vol. 2. 698.

the learned Judges, who preceded me, to ſhew, that it could not be the intention to exempt the preceding claſſes from the operation of the reſtrictive words. I ſhall only add, the word "*as*" is not grammatical at all. There is nothing here for it to refer to. I read that word, as if it was "*who.*" If it is read as "*who,*" it muſt apply to all the members of the ſentence.

The next queſtion is, whether the Teſtator has tranſgreſſed thoſe rules, now ſo well eſtabliſhed, that it would be ſuperfluous to repeat them, the rules laid down in *The Duke of Norfolk's Caſe*, and ever ſince adhered to without objection? Upon the preſent occaſion the queſtion is, what was the real meaning of the Teſtator? It is very material to detail that caſe; though I am perfectly ſatisfied, it is freſh in your Lordſhip's memory. It was clearly decided by that caſe, that every Executory Deviſe is good, that does not tend to a perpetuity. Thoſe words are certainly not very explicit: but they are clearly explained by the Judgment of your Lordſhip's illuſtrious predeceſſor, Lord *Nottingham*. The meaning is, that every Executory Deviſe is good, that does not tend to make an eſtate unalienable beyond the period allowed by Law as to legal eſtates; which could not be protected beyond the time, at which the remainder-man, who was not in exiſtence at the time of the limitation of the eſtate, would arrive at the age of maturity. To prevent Executory Deviſes and Truſts from having that effect was the miſchief and inconvenience, and the only miſchief and inconvenience, againſt which it was neceſſary to guard. It was ſuppoſed, that Lord *Nottingham* has laid down no rule except as to the convenience and inconvenience; that according to his reaſoning Executory Deviſes muſt depend upon that only; and that the convenience and inconvenience of every particular caſe was left to be judged of by his ſucceſſors. I will not impute to Lord *Nottingham* ſo ſtrange a rule. So far from laying down ſuch a rule, he ſtates the objections, and gives an anſwer to them. He ſays, he means to confine Executory Deviſes and Truſts within the limits of Eſtates tail; and without any exception he gives the ſame extent to Executory Deviſes and Truſts. He ſtates, and comments upon, the caſe of *Wood* v. *Saunders* (*a*); and gives the reaſon, why the remainder in that caſe was good; becauſe it was limited upon a contingency, that was to happen within two lives; which was but a ſhort contingency; and the

Every Executory Deviſe is good, that does not tend to a perpetuity: *i. e.* that does not tend to make an eſtate unalienable beyond the period allowed by Law as to legal eſtates.

(*a*) 3 *Ch. Ca.* 35-51.

Law might very well expect the happening of it. He ſtates (a) as a clear propoſition, that if a Term be deviſed, or the truſt of a Term limited, to one for life with twenty remainders for life ſucceſſively, and all the perſons *in eſſe* and alive at the time of the limitation of their eſtates, though they look like a poſſibility upon a poſſibility, they are all good; becauſe they produce no inconvenience, they wear out in a little time; and ſo was *Alford's Caſe*.

Limitation of a Term or the truſt of a Term for twenty lives in being ſucceſſively is good.

That is the caſe of *Goring* v. *Bickerſtaffe*. It is ſaid to be impoſſible, that Lord *Nottingham* could have ſtated the caſe of twenty remainders on account of the inconvenience: but the Report in no part negatives his having ſaid ſo; and it falls exactly within the reaſon; for by a Common Law Conveyance twenty remainders may be limited. It is true, ſince the Revolution Judges have diſapproved of carrying Executory Deviſe beyond the line, to which it had gone: but there is no inſtance of a limitation of the number of lives in any of thoſe caſes. The real fair inference from the rule, and it has been acquieſced in ever ſince, appears to me to be this; that the number of the Lives is not material. Until the argument of this Caſe ſuch a notion never occurred to any Lawyer: nor can it be ſupported, unleſs the doctrine, that has been contended for, prevails, that in every caſe the Court is not to look for a general rule, but for particular inſtances, in which the rule has been acted upon; and is to go no farther. There is no ſuch rule. It is contrary to the firſt principles of judicial determination, and would veſt a moſt dangerous power in the Judges; a power, which no Judge would wiſh to poſſeſs. The Judges are to declare the Law, not to make the Law. If an inconvenience ariſes, the Legiſlature, not the Judges, muſt apply the remedy. Nothing can ſhew the dangerous conſequences of arguing upon convenience and inconvenience more than the argument of this caſe. It is ſaid, the Judges ought to ſtop, where their predeceſſors have ſtopped: that is, at three lives. The conſequence would be that the diſcretion of the laſt Judge, who decided ſuch a queſtion, muſt guide the diſcretion of all ſucceeding Judges; and the Judge who extended the limits to three lives, might with equal reaſon, as your Lordſhip is now urged not to go farther, have been urged not to go beyond two lives. That is not the caſe. In *Humberſton* v. *Humberſton* it was extended to a great number of lives. That caſe was relied on by Mr. *Har-*

Since the Revolution Judges have diſapproved of extending Executory Deviſe: but there is no inſtance of a limitation of the number of lives.

(a) 3 *Ch. Ca.* 29.

grave, not with his uſual accuracy, to prove, that a child *en ventre ſa mere* could not take for life. That caſe does not affect this point. The decree is ſtated by Mr. *Cox* with the accuracy, that marks all his notes: but, though I knew, I could have truſted to that ſtatement, I ſent for the Regiſter's Book to ſee, what it was upon the face of the proceedings. The words of the decree, as they ſtand in the Regiſter's Book, are not ſo accurately expreſſed as might have been expected. The Decree directs "that the "maſter ſhould ſee a ſettlement made of the ſaid truſt eſtate pur-"ſuant to the ſaid will with limitations to the ſeveral perſons "named to be tenants for life in the ſaid will, and to the heirs "male of their bodies in ſtrict ſettlement according to the courſe "of Law; and if any of the parties, who are made tenants for "life, have any iſſue male living, their names are to be inſerted "in the ſaid deed of ſettlement."

That is not a very accurate way of ſtating it. Inſtead of the words "to the heirs male of their bodies in ſtrict ſettlement "according to the Courſe of Law," it ought to have been to the firſt and other ſons and the heirs male of their bodies ſucceſſively. But the intention of the Court in that reſpect is clear. There muſt however have been ſome inaccuracy in that caſe. It is doubtful, whether the Decree meant, that all the perſons named, who were in exiſtence at the time the Decree was pronounced, ſhould be made tenants for life. I cannot think, that was the meaning. It muſt have meant all the perſons named, who were in exiſtence at the time of the Teſtator's death; for it cannot be contended, that the children born after the Teſtator's death ſhould by the accident of being born before the Decree have eſtates for life given to them. It was contended by Mr. *Hargrave*, that if any ſuch perſons were *en ventre ſa mere*, they would not have been included among the tenants for life. But ſuppoſe, the eſtate, inſtead of being given to the iſſue of thoſe perſons, had been given to all the fifty perſons for their lives, before any eſtate-tail was given: it is impoſſible to ſay, any objection could have been raiſed. I will conſider afterwards, what the conſequence would be, if it had been ordered to accumulate. It is clear therefore, that upon every rule of conſtruction Your Lordſhip is bound to hold, that property may be rendered unalienable for any number of lives in exiſtence at the time of the gift or deviſe.

A child *en ventre ſa mere* is a life in being to all intents and purpoſes except in the caſe of a deſcent at Common Law.

It remains then to be conſidered, whether a child *en ventre ſa mere* is a life in being. I conſidered the caſe of *Long* v. *Blackall* a complete deciſion upon that point. I believe, the Counſel for the Family are right in ſaying, that was the firſt caſe, in which ſuch child was taken both at the beginning and at the end of Executory Deviſe. It was not done in that caſe: but that might have been the conſequence. But ſince the *Statute* of *William* and *Mary* (*a*) ſuch children are conſidered to all intents and purpoſes as actually born; which appears from ſeveral caſes: *Beale* v. *Beale*, *Northey* v. *Strange*, *Burdet* v. *Hopegood* (*b*), and *Millar* v. *Turner* (*c*). In *Roe* v. *Quartley*, 1 *Term Rep. B. R.* 634. Mr. Juſtice *Aſhburſt* ſays upon the firſt objection, that the limitation was too remote, "This objection ſeems not to have been much "relied on by the Defendant's Counſel; and indeed ſince the "*Statute* 10 and 11 *Will.* 3., which puts poſthumous children on "the ſame footing with children born in the lifetime of the an-"ceſtor, this objection ſeems to be removed; whatever might "have been the caſe before."

In *Doe* v. *Clarke*, the words of *Eyre*, Chief Juſtice, are, that, independent of the intention of the Teſtator, "an infant *en* "*ventre ſa mere*, who by the courſe and order of nature is then "living, comes clearly within the deſcription of children living at "the time of his deceaſe."

There is a caſe, not immaterial to this point from the doctrine laid down by Lord *Hardwicke* in his conſtruction of the *Statute*. That is the caſe of *Baſſet* v. *Baſſet* (*d*); in which Lord *Hardwicke* upon the queſtion as to the right of the poſthumous ſon to the rents and profits of the ſettled eſtates accrued before his birth ſays, the poſthumous ſon muſt take them: otherwiſe he would not take as if born in the lifetime of the father; which the *Statute* poſitively enacts.

It will hardly be contended, that the operation of the *Statute* and the determinations ſince are to extend only to the very caſes provided for by the *Statute*; for, firſt, it is remarkable, it is confined to marriage or other ſettlement. In a caſe (*e*), that ſhortly

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(*a*) 10 and 11 *William* and *Mary*, *c.* 16.

(*b*) 1 *P. Wms.* 244. 341. 487.

(*c*) 1 *Veſ.* 85. *Burnet* v. *Mann*, 1 *Veſ.* 156.

(*d*) 3 *Atk.* 203.

(*e*) *Reeve* v. *Long*, 1 *Salk.* 227. 3 *Lev.* 408. 4 *Mod.* 282. 12 *Mod.* 53. *Skinn.* 430. *Comb.* 252. *Carth.* 309.

preceded the *Statute*, the Houſe of Lords had declared the Law to be in favor of ſuch a deviſe: but that deciſion was contrary to the opinion of the Judges; and the *Statute* was made, in order that the Judges might conform to it. But if the *Statute* is taken literally, it will not apply to the caſe of a poſthumous ſon entitled to a remainder upon the death of a ſtranger. That would not come within the words of the *Statute;* which is thus expreſſed:

"Where any eſtate already is, or ſhall hereafter, by any mar-
"riage or other ſettlement be limited in remainder to or to the
"uſe of the firſt or other ſon or ſons of the body of any perſon
"lawfully begotten, with any remainder or remainders over to
"or to the uſe of any other perſon or perſons, or in remainder
"to or to the uſe of a daughter or daughters lawfully begotten,
"with any remainder or remainders to any other perſon or per-
"ſons, that any other ſon or ſons or daughter or daughters of
"ſuch perſon or perſons lawfully begotten or to be begotten, that
"ſhall be born after the deceaſe of his, her, or their, father, ſhall
"and may by virtue of ſuch ſettlement take ſuch eſtate ſo limited
"to the firſt and other ſons, or to the daughter or daughters, in
"the ſame manner as if born in the lifetime of his, her, or their,
"father, although there ſhall happen no eſtate to be limited to
"Truſtees after the deceaſe of the father to preſerve the con-
"tingent remainders to ſuch after-born ſon or ſons, daughter or
"daughters, until he, ſhe, or they, come *in eſſe*, or are born, to
"take the ſame."

There can be no doubt, that the operation of the *Statute* muſt be extended to all ſuch children; whether they are children of the perſon, upon whoſe death the remaïnder takes place, or of ſome other perſon.

It muſt be admitted, that there is one caſe, in which to a certain extent a child *en ventre ſa mere* is not conſidered to all intents and purpoſes as in exiſtence. That is in the caſe of a deſcent at Common Law. Notwithſtanding the *Statute*, and that in every other caſe ſuch child is conſidered as born from the time the deviſe or limitation takes place, in that caſe the intermediate rents and profits, as in the caſe of *Baſſet* v. *Baſſet*, are declared to belong to the heir at Law. That aroſe from the rigor of the

Common Law with regard to real eſtates, requiring a Tenant to the *Præcipe*.

The queſtion then is, can an eſtate according to the rules of Law be limited to an infant *en ventre ſa mere* for life, with remainder to the firſt and other ſons of that infant in tail, ſo as that the iſſue may take as purchaſers? Upon the firſt part of the queſtion, ſuppoſing, the Teſtator intended at all events to comprehend children *en ventre ſa mere*, the *Statute* ſays, they ſhall take, as if they were born in their father's life-time. If they cannot take as purchaſers, they will not take as if they had been born in the father's life-time. I ſee no reaſon, why they ſhould not take under the words of the *Statute*. Then unqueſtionably they might have been made tenants for life, with remainder to their iſſue. I will put this caſe to thoſe, who contend, that the limitation could not be to a child *en ventre ſa mere* for his life, with remainder to ſuch perſon as ſhould be his heir at Law at his death. Suppoſe, an eſtate was limited to all the ſons of *A.* living at the death of the Teſtator for their lives, with remainder to ſuch perſon as ſhall be the heir at Law of the ſurvivor. If *Doe* v. *Clarke* and the other caſes are right, a child *en ventre ſa mere* at the death of the Teſtator might according to the ſtrict conſtruction of the rule take; for it is for his own benefit. Undoubtedly he would take under the deſcription of a ſon "*living at the death of the Teſtator*." He would take under that very deſcription. Then is the remainder over void, or good? If it is void, why? The anſwer would be, becauſe the ſon was not living at the death of the Teſtator. So he would take the eſtate under the very deſcription of a ſon living at the death of the Teſtator; and the limitation over would be void, becauſe he was not living at the death of the Teſtator. In this very caſe, if, inſtead of directing the rents and profits to accumulate, the Teſtator had included all theſe lives, and given eſtates for life to all of them, is there any doubt, the children *en ventre ſa mere* would have taken? Without any queſtion they would. Would then the eſtates given to them be different from thoſe given to all the other perſons? Muſt thoſe children have taken eſtates tail, though taking under the deſcription of iſſue living at the death of the Teſtator. There is an inconſiſtency in the propoſition.

But I ſpeak upon this point with great deference to the learned Judges; to whom this queſtion entirely belongs. If the caſe of

Long v. *Blackall* is not conſidered as having finally ſettled it, and if your Lordſhip has any doubt upon it, then it would be neceſſary to conſider, whether the words "*born in due time afterwards*" have not afforded a conſtruction, that would put an end to this point. Suppoſing, any doubt is entertained upon it, then the queſtion is, whether the conſtruction put upon the words "*born in due time afterwards*" by the learned Judge, who opened this caſe, is not according to the rules, to which we are bound to adhere, fairly to be inferred to mean ſuch perſons, born after the Teſtator's deceaſe, during whoſe lives the eſtate created by him may by courſe of Law endure. As to the period of twenty-one years, that could not be his meaning: nor, with ſubmiſſion to the learned Judge, who immediately preceded me, has it ever been conſidered as a term, that may at all events be added to ſuch Executory Deviſe or Truſt. I have only found this *dictum*: that eſtates may be unalienable for lives in being and twenty-one years, merely becauſe a Life may be an infant, or *en ventre ſa mere*. Therefore I am clearly of opinion, that expreſſion cannot be held to mean more than Children in the womb at the Teſtator's death.

Reaſon for allowing the twenty-one years after lives in being for Executory Deviſe.

The queſtion then is, whether the true conſtruction of this will as to the ſuſpenſion of the rents and profits and the conveyance is not, that the Teſtator intended to ſuſpend the poſſeſſion during the lives of all the iſſue of his ſons and grandſons, who ſhall be actually born at the time of his death, and of ſuch as in point of Law are to be conſidered as born? It is exactly as if he had recited, that whereas he might limit his eſtates, and render them unalienable, during the lives of perſons in exiſtence, therefore he deviſed them to his Truſtees and their heirs, &c. during the lives of all his ſons and grandſons and their iſſue living at the time of his deceaſe, or in conſtruction of Law to be conſidered as ſuch.

It is my duty to ſubmit to your Lordſhip every argument, that occurs to me, or that is ſuggeſted as likely to occur. If your Lordſhip ſhould not agree in the opinion, that has been delivered, another point may ariſe, whether the Deviſe over would or would not be affected. The Judges have forborn to give their opinion upon that point, thinking it unneceſſary. Therefore I ſhall alſo forbear to give my opinion upon the validity of the Deviſe over, in caſe the firſt limitation cannot take place, unleſs your Lordſhip commands me to enter into that queſtion.

The purpoſe of accumulation no objection to an Executory Deviſe.

As to the accumulation, no ſuch objection has ever been made before in judgment, or in argument, except in the caſe upon Lady *Deniſon*'s will; when it was raiſed in argument. I have always underſtood, and it has never been doubted before, that it is in the power of a Teſtator to direct accumulation of the rents and profits of his eſtate for as long a time as that, during which the Law allows him to render the eſtate unalienable. This was not denied by the Counſel for the Family, except Mr. *Hargrave*; who ſeemed to think accumulation in any extent novel; and that it originated in the time of Lord *Hardwicke*. In the caſes of *Stephens* v. *Stephens*, *Hopkins* v. *Hopkins*, and *Chapman* v. *Bliſlet*, all prior to the time of Lord *Hardwicke*, no objection was made to the legality of accumulation; and it was permitted to take place. The Caſes upon Mr. *Shepherd*'s will (*a*), and upon Mr. *Lockyer*'s will (*b*) are familiar to your Lordſhip. I muſt obſerve, that one caſe, which has been relied on as an authority for the accumulation, is not an authority for it. That caſe is *Phipps* v. *Kelynge*. It was a bequeſt of leaſehold eſtates in truſt from time to time during the term of years therein to lay out the yearly profits in the purchaſe of lands of inheritance, and to ſettle the ſame to the uſe of *Phipps* during his life; remainder to the uſe of truſtees to preſerve contingent remainders; remainder to the firſt and other ſons of *Phipps* ſucceſſively in tail male, with ſeveral remainders over. *Phipps* had a right to call from time to have the rents and profits laid out in lands, to be ſettled. That is not properly a caſe of accumulation.

The caſe upon Lady *Deniſon*'s will is in the *Regiſter*'s Book, under the title of *Harriſon* v. *Harriſon*, 21ſt *July*, 1786. By that will a real eſtate and the reſidue of the perſonal eſtate are ordered to accumulate; and they are now in a ſtate of accumulation, and have been ſo for fifteen years; and that accumulation may endure as long as all the lives in this will. The accumulation was directed to continue, until a ſecond ſon of Miſs *Midgeley*, the Teſtatrix's niece, who was very young, ſhould attain the age of twenty-one; and in caſe ſhe ſhould have no ſuch ſon, then until a ſecond ſon of another niece, of very tender years, ſhould attain that age: ſo, if theſe two ladies live to any age without having a ſecond ſon, the accumulation of the rents and profits of the real eſtate and the pro-

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(*a*) *Gibſon* v. *Lord Mountfort*, 1 *Veſ.* 485. (*b*) *Perry* v. *Phelips*, *ante*, vol. 4. 108.

duce of the reſidue of the perſonal eſtate is to go on. The heir at law and next of kin ſubmitted, whether the deviſe was void. I conclude therefore, the point was made. The Decree certainly takes it as raiſed by the anſwer; for Lord *Kenyon* alludes in the Decree to the very point. The Decree declares the will and codicil of the Teſtatrix well proved; and that the truſts thereof ought to be eſtabliſhed and carried into execution; and that the limitations in the will of the Teſtatrix of her eſtate at *Wheatwood* to or in truſt for the ſecond, third, fourth, and other ſons, &c. are good limitations of the ſaid eſtate; and the bequeſt of the reſidue of the perſonal eſtate of the Teſtatrix to be laid out in land is a good bequeſt; and directions were given for the purpoſe of carrying on the accumulation of that eſtate; and it is now in a ſtate of accumulation.

It will hardly be contended, that the accumulation in that caſe was clear of objection upon any doctrine, that might ariſe from the inconvenience upon the magnitude of the accumulation. It was no inconſiderable eſtate. The accumulation might have been ſuch as no man would wiſh to take place. But the queſtion is, whether from the poſſibility of ſuch a caſe the Court would prevent the operation of the deviſe as far as it might operate according to the courſe of nature. The argument, that your Lordſhip is to ſtop, where your predeceſſors have ſtopped, amounts to this: that your Lordſhip is not to go beyond two lives, becauſe Lord *Kenyon*, the Judge, who ſat laſt upon this point, went no farther. The ſame objection might have been urged upon that occaſion to Lord *Kenyon*: but no ſuch doctrine has prevailed.

I know not, whether it is neceſſary to take notice of an ingenious, but fallacious, argument, that was uſed by Mr. *Grant*: that it is impoſſible, there can be ſuch a principle in any Law, as that accumulation and non-alienation ſhall be co-extenſive, upon the Law of *Scotland*; where upon that principle the land would never be enjoyed; as land may there be made unalienable for ever. But it cannot be contended, that that will apply to the Law of *England*, where non-alienation is limited. Upon the Law of *England* there is no abſurdity in letting accumulation and non-alienation go together; as they always have done. It was never ſuppoſed, that, becauſe great miſchief had ariſen from gifts to charitable purpoſes, therefore the Judges had a power to prevent them. According to this argument the *Statute of Mortmain* and

By the Law of *Scotland* land may be made unalienable for ever under certain regulations.

all the other *Statutes* upon that ſubject were not neceſſary: the Judges might have applied the remedy. It never entered into the mind of any Judge, however he might diſapprove the particular deviſe, that he might upon grounds of policy or convenience ſubvert the rules, that had been eſtabliſhed. I remember a caſe upon the *Statute of Mortmain*, commonly, though not properly, ſo called, before a predeceſſor of your Lordſhip; who called the intention of the Teſtator in that caſe a pillar of vanity. That intention did not deſerve that title ſo well as the object of this Teſtator. In that caſe the Lord Chancellor ſaid, if the Law permitted the erection of ſuch a pillar, he muſt, however reluctantly, lay the firſt ſtone. That, I fear, muſt be your Lordſhip's opinion, if you think this deviſe and bequeſt in point of Law good.

LORD CHANCELLOR.—I am extremely obliged to his Honor and to my Lords, the Judges, not only upon the very able aſſiſtance, they have given me in forming my own opinion upon this caſe, which concurs in the reſult, as in almoſt the whole of the argument, but alſo, becauſe they have relieved me from the duty of entering particularly into the diſcuſſion of the ſeveral points of the caſe, the ſtatement of the arguments, and the grounds, upon which thoſe arguments, that have been urged for the family, have failed to produce the effect upon my mind. I could not go over the caſe without the neceſſity of repeating what has been much better ſtated already. A great part of the ſame courſe of argument, varied perhaps a little in the manner of the expreſſion, muſt occur to thoſe, who have purſued the ſame courſe of inquiry.

I am not ſurpriſed, that this cauſe has called forth great exertions of learning and ingenuity in ſupport of the caſe of this family. The great amount of the property is a ſufficient reaſon for them to undertake to eſtabliſh what would have been their natural right, if no diſpoſition had intervened to prevent it. I have no difficulty in ſaying, the diſpoſition is ſo unkind and ſo illiberal, that I think it no breach of duty in them to endeavour to ſet it aſide, if they can by Law.

The amount of the property, the piety or prudence of the diſpoſition, afford no fair ground for controlling a will.

The great amount of the property can in no poſſible ſhape of the caſe enter into the judgment. The ſame rule muſt guide the determination, whether the property is 100*l.* or half a million. The piety or the prudence of the diſpoſition can as little afford any fair and juſt ground for controlling the will; and it would not be a fair a fair bias upon the mind, if upon conſiderations, that affect the feelings, I was to deceive and blind my underſtanding into the conſtruction, I am to give to the effect of the inſtrument. It is my duty to give effect to the will, as far as the intention can be clearly made out. It is not permitted to me to be affectedly ignorant of the intention; much leſs, to control a certain and eſtabliſhed intention upon my own idea of the fitneſs or unfitneſs, the liberality, or the political tendency, of it.

The purpoſe of accumulation no objection to an Executory Deviſe.

The argument of accumulation, uſed as a ground to condemn the operation of the bequeſt, I apprehend to be, unleſs as it aroſe upon Lady *Deniſon*'s will, entirely new. Upon every queſtion, in all Courts, as to Executory Deviſe both of land and perſonal eſtate the Court has never conſidered it as an eſſential condition, affecting the validity of the Deviſe, that the rents and profits ſhould attend the eſtate during the time it is to go down, before the abſolute property is given. As to perſonal eſtate, wherever a reſidue is the ſubject, the accruing profits of neceſſity fall into the reſidue, and conſtitute the fund, unleſs there is an appropriation of them; and that was never uſed as an argument to affect the validity of the diſpoſition. In the extent this will has taken, I take it to be for nine Lives, (though it is not correctly ſo ſtated,) and that there will be an immediate veſted eſtate afterwards, it is not carried farther, than other caſes, reſolutions and opinions, have ſaid it may be carried. It is not for me to make a new Law; and without making a new rule I do not know what to do; for, unleſs I limit the number of lives, and ſay, what calculation of chances with regard to thoſe lives is to regulate this ſubject, I muſt hold myſelf bound by thoſe rules, that are eſtabliſhed, as it has been obſerved, as matter of poſitive Law.

One argument was uſed, which has been ſo very ably diſcuſſed, that I ſhall not go through the general argument. I allude to the point, that was made in oppoſition to the Caſe of *Long* v. *Blackall*. It is clear, if that caſe is well decided, it removes a great part of the argument againſt a limitation to children *en ventre ſa mere*. It was ſuppoſed, that in ſending that caſe to the Court of *King's Bench* I had ſent it upon a ſtrong doubt, that I entertained upon the queſtion. I am not ſure, but I believe, I took occaſion to obſerve, when I ſent that Caſe to a Court of

Law, that I felt little doubt upon it. My idea of it was confirmed by the determination of the Court of Law. I concur entirely in the opinion given by the Court of *King's Bench*. It was antecedently my opinion, that ſuch would be the determination. I conceived, the Law ſtood clearly ſo eſtabliſhed; and that no other determination could be given by any Court. The caſe of *Reeve* v. *Long*, certainly overruling *Archer's Caſe* (*a*), had decided, that a poſthumous child was to be taken to all intents and purpoſes as born at the time the particular eſtate determined. It was obſerved, the deciſion of that caſe was contrary to the opinion of the Judges. Undoubtedly the Court of *Common Pleas*, firſt, and upon a Writ of Error the Court of *King's Bench*, had held differently. But it ought always to be remembered, it was the deciſion of Lord *Somers*; and that was not the only caſe, in which he ſtood againſt the majority of the Judges; and the better conſideration of ſubſequent times has ſhewn, his opinion deſerved all the regard generally paid to it. What followed was not, as it has been inaccurately ſtated, that the opinion being againſt that of the majority of the Judges, it was ſuppoſed, the Judges would go againſt that deciſion. The *Statute* of *William* 3. was not to affirm that deciſion. It did by implication affirm it: but it eſtabliſhed, that the ſame principle ſhould govern the caſe, where the limitation was by deed of ſettlement. The manner, in which the point has been treated ever ſince in *Burdet* v. *Hopegood* and the other caſes from the time of Lord *Cowper* to that of Lord *Hardwicke*, proves what the opinion has been upon the propriety of a rule, which it is impoſſible to ſay is attended with real inconvenience, and which is according to every principle of Juſtice and natural feeling.

The object of *Statute* 10 & 11 *Will.* 3. *c.* 16. was not to affirm the caſe of *Reeve* v. *Long*: but it eſtabliſhed, that the ſame principle ſhould govern, where the limitation was by deed of ſettlement.

The caſe of *Doe* v. *Clarke* in fact went out of this Court. It appears from the note in *Brown* (*b*), which, I know, is correct in that reſpect, that Lord *Thurlow* was very clearly of opinion, that the poſthumous child ought to take, as if he was born; and he cut the argument; only obſerving, that it was a legal queſtion, and they might bring an ejectment. My reaſon for ſending the caſe of *Long* v. *Blackall* to the Court of *King's Bench* was, that I wiſhed to have it from the authority of that Court, that they concurred in

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(*a*) 1 *Co.* 66.

(*b*) 2 *Bro. C. C.* 320.

the principle, upon which the Court of *Common Pleas* decided in the former caſe.

With regard to the only other legal point in this caſe, whether the deſcription of the perſons to take, when the accumulation has ceaſed, is ſufficiently certain, my opinion, if I was called on to decide that point, is, that they are ſufficiently certain; and, upon the reaſons given by one of the learned Judges, that there is no difficulty in all the caſes, I can put, to declare, who is meant. But if there is a doubt and uncertainty upon it, undoubtedly it is impoſſible for me to decide, that on account of the uncertainty of that deſcription this Will ſhould not now take effect; becauſe events may fall out in this Family, and events not at all improbable, that may put it beyond all poſſibility of doubt, who the perſon is.

I ſhould do myſelf no credit, and ſhould convey no ſort of information to the Bar, if I was to go farther than to expreſs my full aſſent, and to return thanks to the learned Judges and His Honor; who have certainly obliged the Bar as well as me.

THE will being eſtabliſhed, the points, that remain for argument, ariſe upon the claim of the eldeſt ſon of the Teſtator, as heir at law, to the benefit of the contracts for the purchaſe of real eſtates, entered into by the Teſtator between the date of his Will and his death. Suppoſing thoſe eſtates not to paſs by the Will, the queſtion will be, whether the heir ſhall not be put to his election to take under the Will or againſt it.

Note, that, though the Lord Chancellor & the assistant Judges declared their opin-ions, in favor of the late Mr Thellusson's will in the manner before stated, in [illegible] April 1799, yet no actual decree was made till 19. Feb. 1801. I was not present, but I understand from my friend Mr Benyon, who was so good as to hold my papers for me, that the Lord Chancellor expressed a desire of having points of so much importance farther considered ~~by~~ through an appeal from the decree he had made.
F. V. 20. Feb. 1801.

1798.

Rolls. December 7th, 10th, 11th, 13th.

GRIFFIN *v.* NANSON.

A. by a voluntary deed aſſigned all the perſonal eſtate, which he was then or might at any time afterwards be poſſeſſed of or entitled to, upon truſt to pay the intereſt, *&c*, to himſelf for life, and after his deceaſe to ſuch perſons as he ſhould appoint by will for their lives, and ſubject thereto, to pay the principal to his next of kin, who ſhould be living at his deceaſe, his, her, or their, executors, *&c.* Soon afterwards the teſtator by his will gave ſome legacies, and gave the reſidue to the perſons by name, who were his next of kin at the execution of the deed and at his death; upon whoſe bill claiming under the deed an account of the truſt eſtate received by the truſtees and of the perſonal eſtate, *&c*, and to ſet aſide the legacies, it was held, that the power was not executed by the will: but one of the plaintiffs being clearly affected with notice and acquieſcence in the plan of giving the legacies inſtead of executing the power, the cauſe was ordered to ſtand over with liberty to file a bill to eſtabliſh the legacies: the Court inclining, in caſe the other plaintiff could be affected with notice, at all events to apply the intereſt of the perſonal eſtate during the lives of the legatees in payment of the legacies. They were afterwards paid under a compromiſe.

By indentures, dated the 13th of *November* 1792, *Thomas Fielder* gave, granted, bargained, ſold, aſſigned, *&c.* to *Stephen Griffin*, *John Griffin*, *William Nanſon*, and *John Naylor*, and to the ſurvivor of them, his executors and adminiſtrators, all the perſonal eſtate, goods, chattels, money, ſecurities for money, and effects, whatſoever and whereſoever, and of what nature, quality or denomination, ſoever, of him the ſaid *Thomas Fielder*, and of which he was then or ſhould or might at any time hereafter be poſſeſſed or entitled unto, and all deeds, evidences, *&c*, touching the ſame effects, upon truſt to get in and receive all the aforeſaid eſtate, money, and ſecurities, and to ſell and diſpoſe of all the ſaid goods, chattels and effects, as they or the ſurvivors or ſurvivor of them ſhould think moſt proper, and without any farther or other power or authority from the ſaid *Thomas Fielder*, and to lay out the money from time to time to ariſe and be received from the ſaid perſonal eſtate, *&c*, and to inveſt the ſame in the 3 *per cent.* Conſolidated Bank Annuities or other ſecurities in their names, and to pay the intereſt and dividends unto the ſaid *Thomas Fielder* for and during the term of his natural life, or to and for ſuch uſes, ends, intents and purpoſes, as he ſhould by his order in writing under his hand from time to time direct or appoint; and from and after the deceaſe of him, the ſaid *Thomas Fielder*, then as to ſuch intereſt and dividends, upon truſt, that they ſhould pay the ſame, or ſuch part thereof as the ſaid *Thomas Fielder* ſhould or might by his laſt will and teſtament in writing hereafter to be made and duly executed give, direct, or appoint, to be paid to any perſon or perſons for his, her, or their life or lives, unto ſuch perſon or perſons accordingly; and as to the principal of the ſaid money ſo to be inveſted, as aforeſaid, and all other the perſonal eſtate, monies, goods, chattels, and effects, of him, the ſaid *Thomas Fielder*, upon truſt, that they ſhould from and immediately after the deceaſe of the ſaid *Thomas Fielder*, in caſe no ſuch gift, direction or appointment, of the ſaid intereſt and dividends or any part thereof ſhould be made, as aforeſaid, but if any ſuch gift, direction or appointment, ſhould be made, then when and ſo ſoon as the perſon or perſons, to whom ſuch intereſt or dividends or any part thereof ſhould be thereby given, directed, or appointed, ſhould have departed this life, pay, aſſign, transfer, and diſtribute, and divide, all and ſingular the ſaid monies ſo to be inveſted, as aforeſaid, and all other the perſonal eſtate, monies, goods, chattels, and effects, of him the ſaid *Thomas Fielder*, and the ſtocks, funds, or ſecurities, in which the ſame or any part thereof ſhould be inveſted, and the dividends and intereſt thereof then due, unapplied, and undiſpoſed of, unto and amongſt the next of kin of him the ſaid *Thomas Fielder*, who ſhould be living at the time of his deceaſe, his, her, or their executors or adminiſtrators, according to the *Statute of Diſtributions* of inteſtates' eſtates; and the ſaid *Thomas Fielder* did for himſelf, his executors and adminiſtrators covenant, promiſe, and agree, with the ſaid truſtees, that all the aforeſaid perſonal eſtate, monies, ſecurities, goods, chattels, and effects, therein before aſſigned and conveyed ſhould remain upon the uſes, intents, and purpoſes, before declared; and did alſo warrant the ſame upon ſuch truſts.

Thomas Fielder by his will dated the 30th of *December* 1792, directed all his juſt debts, funeral expences and charges of probate, to be paid and diſcharged; and with the payment and diſcharge thereof he charged all his eſtate and effects. He then gave and bequeathed unto *Mary Moore*, his late houſekeeper, the ſum of 800*l.* upon condition and provided, that ſhe ſhall relinquiſh and give up to his executors any and every bond, note, or other ſecurity, promiſe, or undertaking, by letter or otherwiſe, which ſhall or may be in her poſſeſſion, cuſtody or power, at the time of his deceaſe, by him at any time given her for the payment to her or for her uſe of any ſum or ſums of money whatſoever either in his lifetime or after his deceaſe; and alſo upon condition and provided, that ſhe ſhall execute to his executors a releaſe of all claims and demands whatſoever of her, *Mary Moore*, her heirs, executors, adminiſtrators or aſſigns, againſt him and his eſtate and effects, and againſt his executors upon account thereof, as well in reſpect of any and every ſuch bond, note, or other ſecurity, promiſe, or undertaking, in caſe any ſuch ſhall be in her poſſeſſion, cuſtody or power, at his deceaſe, as in reſpect of any other matter, cauſe, or thing whatſoever; but if ſhe ſhall refuſe to relinquiſh and give up to his ſaid executors every or any ſuch bond, note, &c, and to execute ſuch releaſe, as aforeſaid, or if ſhe ſhall bring any action or ſuit at Law or in Equity in reſpect of any ſuch bond, &c, he revoked the ſaid legacy of 800*l.*

The teſtator alſo gave to *Ann James* the ſum of 500*l.* exactly in the ſame manner and upon the ſame condition of relinquiſhing and releaſing any demand againſt him and his eſtate; and as to all the reſt, reſidue, and remainder, of his eſtate and effects whatſoever and whereſoever he ſhould die ſeiſed or poſſeſſed of, intereſted in or entitled unto, he gave and bequeathed the ſame unto his two half-ſiſters *Elizabeth Griffin* and *Mary Griffin*, and to their reſpective executors, adminiſtrators or aſſigns equally to be divided between them ſhare and ſhare alike to and for their own proper uſe and benefit; and he appointed *Nanſon*, *Roebuck*, and *Naylor*, executors.

The teſtator died upon the 6th of *September* 1794 without having made any appointment under the power in the deed; leaving at his death his two half-ſiſters *Elizabeth Griffin* and *Mary Griffin* his next of kin.

Nanſon was the acting truſtee under the deed; and he had carried on the buſineſs of *Fielder* as a fruit broker and grocer.

The bill was filed by *Stephen Griffin* and *John Griffin*, the huſbands of *Elizabeth* and *Mary Griffin* againſt the executors of *Fielder*, and againſt *Mary Moore* and *Thomas Barr*, and *Ann*, his wife, formerly *Ann James*; charging, that the defendants *Mary Moore* and *Ann Barr* had received ſeveral ſums of money and transfers of ſtock from the teſtator and from *Nanſon* over and above what was due to them for wages from the teſtator; and praying, that they may account for the money and ſtock ſo received beyond what was due to them for wages; and that the ſame may be ſet off againſt the legacies claimed by them; or otherwiſe that the ſaid legacies may be declared void and not warranted by the power reſerved to *Fielder* by the deed of 1792; and that the ſaid indentures may be eſtabliſhed, and the truſts thereof performed; that an account may be taken of the truſt eſtate and effects of *Fielder* received by the truſtees, particularly *Nanſon* and *Naylor*, and of all other his perſonal eſtate, and an account of his debts, funeral expences, &c; and that the reſidue may be declared to belong to the plaintiffs in right of *Elizabeth Griffin* and *Mary Griffin* in equal moieties, as the only next of kin of the teſtator.

The defendant *Ann Barr* by her anſwer ſtated, that for about twenty years and till within about three years before the deceaſe of the teſtator ſhe lived with him as one of his ſervants; and he profeſſed great regard for her as an old ſervant. For ſome time before his death he paid her, firſt, 30 *l.* a-year, and afterwards, *viz.* for the year 1792 and from that till his death 40 *l.* a-year; which was paid by *Nanſon*, but by the deſire of *Fielder*. The defendant admitted, that *Fielder* transferred 30 *l.* a-year Short Annuities to her a ſhort time before ſhe quitted his ſervice, about *March* 1791, as part of the reward and compenſation intended for her care, attention and fidelity, for twenty years; and he frequently promiſed amply to provide for her in addition to that. She admitted, ſhe received ſeveral ſums of money from the teſtator in his life: but ſhe applied the ſame in his houſehold expenſes, except ſome ſmall part for her wearing apparel and pocket expenſes; and ſhe ſubmitted, that the will ought to be conſidered a part execution of the power under the deed.

The defendant *Mary Moore* by her anſwer ſtated, that ſhe lived with the teſtator as a ſervant upwards of twenty-one years; during fourteen years of that time as houſekeeper; and ſhe had the ſole care and management of his domeſtic affairs. She was not paid by him any wages during that ſpace of time; he having repeatedly aſſured her, ſhe ſhould be well provided for by his will. She claimed 580 *l.* as an adequate compenſation for her ſervices for twenty-one years; and ſhe ſtated *extra* ſervices by attending him and his wife and his father and mother during illneſs. She ſtated, that in 1789 ſhe lent him the ſum of 47 *l.* 6 *s.* 3 *d.*; for which ſhe ſold 50 *l.* Bank Stock; and in reſpect of that ſhe claimed as a creditor, if ſhe was not to be paid her legacy. About the 25th of *April* 1785 he made her a preſent of 500 *l.* Bank 3 *per cent.* Conſolidated Annuities; which he transferred to her voluntarily; that ſhe might not be diſtreſſed during the time his affairs were ſettling after his death. Until 1791 ſhe paid the dividends of that ſtock to him. For fourteen years before his death he gave her annually 10 *l.* as a new year's gift. Upon the death of his wife he gave her 6*l.* for mourning, and 10*l.* upon the death of his father, and 10*l.* on the death of his mother. While in his ſervice, ſhe received from him what money ſhe wanted for houſekeeping. She ſeldom aſked him for any money for her own uſe: he repeatedly promiſing, he would amply provide for her in his will. She does not believe, the money, ſhe received from him for her own uſe, exceeded 50*l.* In *November* 1792 ſhe quitted his ſervice through the perſuaſion of the truſtees, but againſt the conſent of *Fielder* himſelf. She was offered by *Nanſon*'s direction ten guineas, if ſhe would give a receipt in full of all demands on *Fielder*'s eſtate; which ſhe refuſed. Upon that occaſion the truſtees promiſed, ſhe ſhould be paid an annuity of 40*l.* a-year during *Fielder*'s life; which was paid to her accordingly, commencing at *Michaelmas* 1792 and ending at *Michaelmas* 1794; of which ſhe received four ſums of 10*l.* each from *Stephen Griffin*, and 10*l.* from *Nanſon*, and the remainder through other perſons. That annuity was paid to her on account of her not having received any wages and of *Fielder*'s intention and promiſe to provide for her.

She ſubmitted, that the limitation in the deed to the next of kin of *Thomas Fielder* was void for uncertainty; and that he had a power of diſpoſing of the property by legacies or otherwiſe; and that ſhe had not been fully rewarded for her ſervices.

The defendant *Nanſon* being examined by order depoſed, that the will was executed with the privity of the plaintiff *Stephen Griffin* and *Elizabeth* his wife and by the advice of the deponent, *Roebuck*, *Naylor*, and of *Stephen* and *Elizabeth Griffin*; and the proviſions for the defendants *Mary Moore* and *Ann Barr* were conſidered as reaſonable; the will being intended to revoke a former will executed in 1791, by which the teſtator had given 1500*l.* to *Moore* and 1000*l.* to *Barr*. He informed the deponent, that he had made a preſent to *Moore* of 500*l.* 3 *per cent.* Conſolidated Bank Annuities, and to *Barr* 30*l.* *per annum* Short Annuities, as a reward for their ſervices; and he intended to reward them further at his death. He told the deponent, that he had in 1792 told *John Griffin* and *Mary Griffin*, that he intended to make a new will and thereby give all his property to the deponent, *Naylor*, and *Roebuck*, in truſt to pay the whole intereſt to the defendants *Moore* and *Barr* equally, and the whole to the ſurvivor; and after their deaths the principal between *Mary Griffin* and *Elizabeth Griffin*. The deed prepared by *John Griffin* was taken by his deſire to the deponent's ſolicitor to peruſe and ſettle. In *December* 1792 *Fielder* conſulted the deponent about making a new will, giving the intereſt of all his property to *Moore* and *Barr* and the ſurvivor for their lives, and after their deaths the principal between *Mary* and *Elizabeth Griffin*: but the deponent, *Naylor* and *Roebuck*, adviſed him inſtead of giving *Moore* and *Barr* the intereſt for their lives to give to each of them a ſpecific ſum of money, and to give the reſidue to *Mary* and *Elizabeth Griffin*; which being communicated to *Stephen* and *Elizabeth Griffin*, they concurred in that plan; and it was reſolved on with their concurrence, that 500 *l.* ſhould be given by the will to *Ann Barr* and 800 *l.* to *Mary Moore*, upon condition, that they ſhould relinquiſh and releaſe all demands againſt him or his eſtate. Thoſe ſums given to *Mary Moore* and *Ann Barr* are leſs than the value of their life intereſts in the whole of *Fielder*'s property. *Stephen Griffin* and his wife frequently after the execution of the will expreſſed their approbation of it in preference to the former plan. The deponent believes, *John Griffin* and *Mary* his wife approved of it, from the declarations of *Stephen* and *Elizabeth Griffin*, that it would be as ſatisfactory to *John* and *Mary Griffin* as it was to them, and they would feel equally obliged and ſatisfied thereby; and to the beſt of his recollection and belief *John Griffin* after the execution of the will expreſſed to the deponent his approbation and thanks for the part he and the other executors had taken.

This witneſs confirmed the anſwers of *Mary Moore* and *Ann Barr* as to their ſervices.

Mr. Lloyd, Mr. Graham and Mr. Nedham for the plaintiffs.—In a caſe of this ſort, between pure volunteers (putting out of conſideration for the preſent the claim of the defendants as creditors) this deed is to be conſidered, as if made upon valuable conſideration. In Lord *Cadogan* v. *Kennet*, and *Doe* v. *Routledge*, *Cowp.* 432, 705, Lord *Manſfield* conſiders the implications of fraud from voluntary conveyances as having been carried too far. The *Statutes* (*a*) do not ſay, that voluntary conveyances ſhall be conſidered fraudulent generally, but only, that they ſhall be void *primâ facie*, as againſt creditors and purchaſers. In other reſpects

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(*a*) 13 *Eliz. c.* 5. 27 *Eliz. c.* 4.

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a voluntary conveyance ſtands as firm both at Law and in Equity as any conveyance for the moſt valuable conſideration. In *Gregſon* v. *Riddell*, which underwent much conſideration, Lord *Thurlow* adopted thoſe ſentiments. Upon the marriage of Sir *James Riddell* an eſtate, that came from the mother of Lady *Riddell*, was ſettled to the uſes of the marriage, with a remainder over to the half-ſiſter of Lady *Riddell*. Sir *James Riddell* wanted to ſell the eſtate; and the queſtion was, whether that voluntary remainder over, was defeated by the ſale. Lord *Thurlow* inclined to the opinion of Lord *Mansfield*, that the mere circumſtance of it's being voluntary was not ſufficient, unleſs accompanied with ſome marks of fraud; as, where the party is indebted at the time, &c.

There cannot be a caſe of greater fairneſs than this. It is clear, that the defendants *Moore* and *Barr* had received a great deal from this man; that they were endeavouring to get more, and he was beſet by them. It is not ſurpriſing, that he ſhould be deſirous of relieving himſelf from the importunity of ſuch perſons. With that view he proceeds to make that diſpoſition of his property, which a prudent man would make. He wiſhed to provide for theſe people, but not to injure his own family. Meaning evidently to provide for theſe women he reſerves a power of diſpoſition; and ſubject to that he gives the property to his next of kin. The moment he ſealed that deed he was abſolutely bound both at Law and in Equity as much as if he had received 100,000*l.* for ſo doing; and the property was put out of his power, ſo that he could not affect it by his will: *Villers* v. *Beaumont*, *Bale* v. *Newton*, 1 *Vern.* 100; 464.

Upon the next point, "*next of kin*" is a ſufficient deſcription. It is equivalent to naming the perſons. It would be a ſtrange conſtruction, that this elaborate deed, executed for the purpoſe of ſettling his affairs, amounts to nothing more than an agreement to die inteſtate. If the truſtees had neglected their duty, and the property was in danger of being ſquandered, the perſons ſtating themſelves to be next of kin might have come to this Court to have it ſecured for their benefit. There are many caſes of deviſe, in which ſuch words have been held a definite deſcription; and if this was upon a will, there would be no doubt, the next of kin at the death of the teſtator would be entitled as *perſonæ deſignatæ*.

This deſcription is as good as that of firſt and ſecond couſins; which was the deſcription in *Mayet* v. *Mayet*, 2 *Bro. C. C.* 125; or relations; which in *Green* v. *Howard*, 1 *Bro. C. C.* 31. was held to mean next of kin. *Spink* v. *Lewis*, 3 *Bro. C. C.* 355. is preciſely this caſe; unleſs there can be a difference in this reſpect between a deed and a will. Theſe words were there conſidered a very good deſcription, well known in the Law. The only doubt in that caſe was, whether the perſons claiming muſt not ſuſtain the double character of next of kin at the death of the teſtator and at the period of diſtribution. The conſtruction muſt be the ſame upon a deed. Where there is a covenant to ſtand ſeiſed, or an eſtate is limited to *A.* for life; remainder over, the perſon, who anſwers the deſcription, when the particular eſtate determines, will be the perſon to take. "Heirs of the body" is a good deſcription: *Harris* v. *Barnes*, 4 *Bur.* 2157; 1 *Black.* 643. "Heir" is a good deſcription; *Selby's Caſe.* The deſcription of next of kin is as definite as that of heir at law. A remainder to the next of kin after the death of *A.* would be a good contingent remainder. In *Shep. Touch.* 235. there are many caſes of this kind both as to real and perſonal property. In *Fearne's Cont. Rem.* 6. one ſpecies of contingent remainders is deſcribed to be, where the perſon, to whom it is limited, is not aſcertained.

It is impoſſible to contend, that the will is an execution of the power. It is merely an attempt to revoke the deed, no power of revocation being reſerved. There is not the leaſt reference to the power given by the deed: but groſs ſpecific ſums are given to theſe defendants. No notice is taken of the deed executed only ſix weeks before; and the power was only to diſpoſe of the intereſt for life. No inference can ariſe, that he intended to execute it. This Court will not ſupply the non-execution of a power even in thoſe caſes, in which a defective execution would be aided.

As to the claim of the defendants as creditors, that is paramount the will; and if it is inſiſted on, they muſt give up their legacies; and there muſt be a trial at law to aſcertain what is due to them, taking into conſideration what they have received.

Mr. Piggott, Mr. Johnſon, and Mr. W. Agar, for the defendants.—It was neceſſarily uncertain, who would be the next of kin of *Fielder* at the time of his death. The parties foreſaw, that the

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next of kin at that time might be either a male or a female; and they provide for that. There is no donation to theſe two half-ſiſters. They are not even mentioned in the deed. It is ſaid, if after the execution of this deed the owner of the property choſe to ſpend a little more than the income of it, an application might have been made to this Court to preſerve the fund and prevent him from having more than the intereſt. Who could have made that application? His next of kin. At what time? Between the execution of the deed and his death; though the deed ſpeaks of next of kin, who ſhall be living at the time of his deceaſe. Would the Court have tolerated an application to prevent a man from diſpoſing of his own property, becauſe he had executed ſuch a contract as was never before exhibited in a Court? Is the conſideration merit of any kind? Is it marriage, the advancement of a child, or any other meritorious object? It is a contract for none of thoſe conſiderations, neither of the primary order, nor of the ſecondary kind; as Lord *Hardwicke* calls the advancement of children, *&c.* If the plaintiffs had married upon the faith of this deed, the queſtion might have been different. It amounts to nothing more than a contract to die inteſtate, a contract upon no conſideration. All the caſes therefore of marriage ſettlements and wills have no relation to this. If a teſtator identifies the object of his bounty, it is indifferent, how he deſcribes him. It is impoſſible to ſuſtain this deed in the extent contended; that from the time of the execution it is to operate as a will, and to deprive the owner of the teſtamentary power over his property for the remainder of his life. He was at perfect liberty to exerciſe all the rights of property. By ſuch a deed he had abridged himſelf of none of them. Suppoſe, he did not chooſe his property to continue perſonal eſtate: could he not have called on the truſtees to pay him the money, in order to lay it out in land? Could they have refuſed? If he had continued in trade, and had become a bankrupt, this deed could not have ſtood even againſt creditors by debts contracted ſubſequent to the date of the deed. That is the criterion, by which it muſt be tried. To whom would the property have belonged? The object was, that the truſtees ſhould take upon themſelves the whole management of his affairs. His creditors would be defrauded, and he might be ſtarved, if the next of kin would take as purchaſers. Suppoſe, he had married, and had children after the execution of this deed.

But upon the circumſtances of this caſe it is not neceſſary to conſider the conſtruction of the inſtrument; for if the will cannot be conſidered an execution of the power, the evidence ſhews, the plaintiffs *Stephen Griffin* and wife have prevented the execution of it, and now endeavour to avail themſelves of the non-execution; which brings it within that numerous claſs of caſes, where a perſon ſees another attempting to diſpoſe of property, without informing him, that he has no power to do ſo: *Berrisford* v. *Milward*, 2 *Atk.* 49. (*a*); *Reech* v. *Kennegal*, 1 *Veſ.* 123; 1 *Wilſ.* 227; *Amb.* 67; and other caſes, where a teſtator has been prevented by fraud from complying with the proviſions of the *Statute of Frauds* (*b*). I admit, it is not by the evidence brought home to *John Griffin* and his wife. The claims of theſe defendants in reſpect of their ſervices are moſt meritorious; and the intention of the teſtator in their favor is clear. This deed, of this extraordinary nature, paſſing all future property as well as all he then poſſeſſed, was obtained from this man, in ſuch a ſtate of incapacity as not to be equal to the management of his own buſineſs, at the houſe of *Griffin* in the country. Under theſe circumſtances the Court will not interfere in favor of theſe plaintiffs claiming under this voluntary deed without any ſort of merit; but will leave them to their remedy at Law. In no inſtance has this Court executed a voluntary ſettlement.

As to the will, conſidered as an execution of the power, an inſtrument the moſt informal has been conſtrued an execution of that power, by which alone it could take effect, if there was no other property, upon which that inſtrument could operate (*c*).

Maſter of the Rolls.—No doubt, the will might be an execution of the power, if it was any thing like an execution of it.

Suppoſe, this deed had ſettled real eſtate, to the uſe of *Fielder* himſelf for life; remainder to ſuch perſons as he ſhould appoint; remainder to his own right heirs: would the heir have taken by deſcent or purchaſe?

Reply.—There is a clear difference. So much of the reverſion is not diſpoſed of. It would be conſtrued no diſpoſition as to that.

(*a*) See Mr *Cox's* note upon *Mocatta* v. *Murgatroyd*, 1 *P. Will.* 394.

(*b*) 29 *Car.* 2. c. 3. *Barrow* v. *Greenough*, *ante*, vol. 3. 152. See more caſes of the ſame ſort collected in the note, *ante*, vol. 3. 38, 39.

(*c*) See *Standen* v. *Standen* and *Langham* v. *Nenny*, *ante*, vol. 2. 589: vol. 3. 467; and the caſes there cited.

Therefore the heir takes by deſcent. It depends upon feodal reaſons. But ſuppoſe it was to ſuch perſon as ſhould be his heir at his death: that would turn him into a purchaſer. Is that rule as to real eſtate to be applied to the caſe of perſonal eſtate? As to that there are no perſons, who in contemplation of Law take by deſcent from the anceſtor. As to real eſtate the Law leans in favor of the deſcendant. There is no ſuch favor for the next of kin. They do not take by deſcent, or by any partiality of the Law, but merely by virtue of repeated Statutes; and not till modern times have they been underſtood to ſtand *de jure* in the place of their anceſtor.

The deed was executed with the privity of *Nanſon*. The evidence does not effect *John Griffin;* and as to *Stephen Griffin*, it does not appear, what induced to the converſation; which would give it a very different turn.

I agree, this deed is voluntary ſo far that it does not affect creditors. But what is meant by ſaying, this Court will not interfere in favor of the plaintiffs. If a voluntary conveyance is defective at Law, the Court will not ſupply that defect againſt the repreſentatives; for it is only an agreement, and is nothing in a Court of Equity without conſideration: but if it is under ſeal, it is good to maintain an action, after creditors are paid. This bill does not pray any thing in aid of the deed, but a conveyance of the truſt property poſſeſſed by *Nanſon* in his character of truſtee. Nothing is prayed againſt him as executor. When a truſtee under a voluntary deed has got the fund into his own hands, the Court will make him account with the *Ceſtuy que truſt*. It is objected, that *Fielder* himſelf might have called upon the truſtees for the property. He never did any act to controvert this deed. He never revoked it, if he could have done ſo. The fund, is in *Nanſon*'s poſſeſſion either for volunteers or for the perſons claiming under the deed. The caſes cited from *Vernon* prove, that a voluntary deed, which is void againſt creditors and purchaſers, cannot, if there is no power of revocation, be deſtroyed by will. The words of this deed are in direct oppoſition to "executors and adminiſtrators." Under thoſe words, I admit, but under thoſe only, the property would have gone back to him by act of Law. There can be no do doubt of the intention of theſe parties. According to the common practice next of kin are put in on purpoſe to prevent it from going to executions and adminiſtrations; as upon a marriage ſettlement upon the wife for life, then upon the children, in default of children, according to her appointment, and in default of appointment, to her next of kin at the time of her death: that would be without doubt a good limitation. Is there any ſenſible ſolid difference between theſe words in a voluntary deed and in a deed upon valuable conſideration? There is no rule, that makes it neceſſary to fix the *Ceſtuy que truſt* at the date of the deed. It may depend upon a contingency, that muſt be aſcertained at the death of the grantor. In a deviſe to the next of kin or relations of the deviſor theſe words are a deſcription of the perſons, who ſhall be ſo at the time of his death. They are a fixed object, when the will ſpeaks. There is no reaſon, why in a grant they ſhould be fixed before the death of the grantor. It is objected, that *Fielder* might have married after the execution of this deed. If he had, his wife would have taken nothing; becauſe by the execution of that inſtrument he had deprived himſelf of all dominion over his property. Her caſe would not be harder than if ſhe had married a man ſeiſed of an equitable eſtate only. Suppoſe, inſtead of this deed *Fielder* had given the plaintiffs a voluntary bond or a covenant, that would have covered all his aſſets: no doubt, ſuch an inſtrument under ſeal, carrying its conſideration with it, though in this Court it would have been poſtponed to creditors, would have been good againſt the widow or next of kin. This does not reſemble Mr. *Pulteney's Caſe.* That was a bill by perſons, who would have been the next of kin of Mr. *Newport* the lunatic, if he had been that day dead. They had no more right than an heir during the life of his anceſtor; a mere hope of ſucceſſion; which as to real eſtate may be barred; but is no right whatſoever as to perſonal eſtate. Theſe plaintiffs have as much intereſt as if they were named. Upon the authorities the moſt material difference ariſes from the circumſtance, that the truſtee has got the property, and there is no neceſſity to have recourſe to the grantor or his repreſentatives for any thing. I admit, if the inſtrument was defective, ſo that no action would lie, this Court would not inforce it. In *Colman* v. *Sarrell*, 3 *Bro. C. C.* 12. (*ante*, vol. 1. 50.) the principle as to voluntary deeds is laid down by Lord *Thurlow*.

At the cloſe of the argument the *Maſter of the Rolls* ſaid, he was not ſure, that there had been any ſuch caſe *in ſpecie*; nor, that, if *Fielder* had married, his wife would not have come in under the deſcription upon ſuch a deed as this (*a*).

Dec. 13th.

Maſter of the Rolls.—I do not feel myſelf in a ſituation to decide this cauſe, as it is brought forward. Upon the footing, upon which this bill reſts, it is impoſſible I can make the decree prayed. The bill makes theſe legatees parties; and prays, that their legacies may be ſet aſide. My inclination is much againſt the plaintiffs. With regard to one of them, *Stephen Griffin*, it is impoſſible, he ſhould ſucceed. Upon the evidence he would be anſwerable in reſpect of his part of the property under the truſt deed.

I have looked into the caſe of Lord *Bath* and Lord *Mountague*, 3 *Ch. Ca.* 5. upon the will of the Duke of *Albermarle*; in which the Lord Keeper was aſſiſted by the Judges. That caſe is in ſome reſpects very like this. The deed, that was impeached in that caſe upon equitable grounds, had been eſtabliſhed at Law. It was ultimately determined, that it was a voluntary deed under ſuch circumſtances, that Equity would not interpoſe againſt it. There was no idea, that Equity would interfere in favor of it. Great ſtreſs was laid there upon the circumſtance, that the teſtator had forgot that deed.

Apply that to this caſe. A man by the advice of a voluntary truſtee, made by himſelf, makes an alteration in his will; being adviſed, that inſtead of executing his power by giving theſe perſons the intereſt of his property during their lives, he ſhould change that deſign, and give them groſs legacies; and he does this with the knowledge of one of the perſons claiming now as next of kin. In ſuch a caſe I ſhould pauſe very much, before I ſhould ſet aſide the legacies.

I wiſh, theſe parties would do what is the juſtice of the caſe; that is, eſtabliſh their legacies. There is conſiderable doubt with me, whether at all events they ſhould not have the benefit of the perſonal eſtate during their lives; and whether I ſhould not ſequeſter the perſonal eſtate, till their legacies ſhall be paid.

Therefore let this cauſe ſtand over, with liberty for any of the parties claiming under the will to inſtitute a ſuit againſt the executors;

(*a*) See *Watt* v. *Watt*, *ante*, vol. 3. 244.

cutors; and let the executors ſet forth exactly what the perſonal eſtate conſiſted of at the execution of the deed, under what circumſtances it was at his death, and how much was got in. If there were any *Choſes in action* at the time of his death, they cannot be included in that deed.

I wiſh, before it comes on again, that caſe of Lord *Bath* and Lord *Mountague* ſhould be very much examined.

If the defendants can make ſuch a caſe againſt *John Griffin* as they have againſt *Stephen Griffin*, it will be perfectly clear. As it now ſtands the claim made to take the whole, giving theſe legatees nothing, is really monſtrous. It is cheating a man by means of making him execute a voluntary deed. If they can prove, that *John Griffin* knew this, that will be enough for me.

The Maſter of the Rolls in the courſe of what he ſaid propoſed a compromiſe; and the ſuit was ſoon afterwards compromiſed: the plaintiffs paying the legacies; and giving to each of the legatees the ſum of 50*l.* in reſpect of coſts and intereſt.

LORD DILLON *v.* ALVARES.

Dec. 14th.

Plea of a ſuit depending in the Court of Chancery in *Ireland* for the ſame matter overruled.

The bill ſtated, that in 1768 the plaintiff being under the age of twenty-three borrowed from the defendant the ſum of 3200*l.* upon ſecuring to him a rent-charge of 1000*l.* *per annum* during the plaintiff's life, payable out of an eſtate in *Ireland*, to which the plaintiff was entitled in remainder after his father's death: the payment to commence upon the death of his father or of his uncle *George*, Earl of *Litchfield*, which ſhould firſt happen. The plaintiff accordingly granted ſuch annuity by deed, dated the 17th of *February* 1768; and he alſo gave a bond in the penalty of 10,000*l.* and warrant to confeſs judgment.

The plaintiff afterwards borrowed 600*l.* more from the defendant; for which he executed a bond and warrant, dated the 1ſt of *Auguſt* 1768, ſecuring to the defendant an annuity of 100*l.* during the plaintiff's life, to commence from the date of the bond.

In 1772 the latter annuity being in arrear, and the defendant preſſing, that ſecurity was changed into a grant of a rent-charge of 320*l.* *per annum* during the plaintiff's life, payable out of the ſaid eſtate in *Ireland*, to commence upon the death of the plaintiff's ſaid father or uncle, which ſhould firſt happen. The deed granting that rent-charge and a bond in the penalty of 4000*l.* were executed upon the 25th of *January* 1772, in conſideration of the ſaid ſum of 600*l.*, the Exchange, valued at 100*l.* an arrear of 186*l.* 1*s.* 8*d.* upon the former annuity, and the ſum of 113*l.* 18*s.* 4*d.* in caſh.

Four months after that tranſaction, in 1772, *George*, Earl of *Litchfield*, died; leaving his eſtate to his uncle, the late Lord *Litchfield* and his iſſue in ſtrict ſettlement; remainder to the plaintiff and his iſſue in ſtrict ſettlement. Upon the death of the late Lord *Litchfield* in 1776 the plaintiff became ſeiſed of that eſtate; and upon that occaſion a meeting was called of his creditors; and his affairs were ſettled by their giving up the ſecurities they had, and accepting the money fairly advanced, with intereſt at the rate of 5*l.* *per cent.* The defendant refuſed to do ſo; notwithſtanding ſuch offer was repeatedly made. The plaintiff's father died in 1787. The defendant commenced proceedings againſt the plaintiff in the Courts in *Ireland* upon the ſecurities in his poſſeſſion; and threatens to commence proceedings againſt him in this kingdom.

The bill prayed, that the ſeveral deeds of annuity and bonds executed by the plaintiff might be delivered up to be cancelled upon diſcharging what might appear to be fairly due to the defendant; that an account might be taken; and that the defendant might be reſtrained by injunction from proceeding at Law.

The defendant pleaded, that before the bill was exhibited, *viz.* in or before *Eaſter* Term 1796, the plaintiff did exhibit his bill in the Court of *Chancery* in *Ireland*; that the ſaid bill was for the ſame matter, and to the ſame effect, and for the ſame relief and purpoſe, as the preſent bill; and the defendant put in an anſwer; and the plaintiff replied thereto; and the ſaid ſuit is depending in the Court of *Chancery* in *Ireland*, and undetermined. Therefore the defendant pleaded the ſame in bar.

Attorney-General in ſupport of the plea ſaid, it ought to have been referred to the Maſter to look into both ſuits; and by this mode the defendant may be haraſſed in every country.

Solicitor-General and Mr. Mansfield for the plaintiff, cited *Foſter* v. *Vaſſall*, 3 *Atk.* 587; and obſerved, it was impoſſible, that the injunction in *Ireland* could have any effect in this country.

Lord Chancellor. Can I ſend it to the Maſter to look into a Bill in *Ireland*?

Where a man has an eſtate in *England* and another in *Ireland*, the ſuit muſt go on in both countries.

Plea overruled.

STEPHEN *v.* GINI.

Dec. 17.

Upon an injunction bill to ſtay proceedings at law, the defendant living abroad, a motion, that ſervice of *Subpœna* upon the attorney may be good ſervice, requires an affidavit of merits.

The bill was filed for an injunction to ſtay proceedings at law. A motion had been made on the part of the plaintiffs, that ſervice of the *Subpœna* upon the defendant's attorney at law may be good ſervice.

The affidavit, upon which this motion was grounded, ſtated, that the defendants reſided at *Leghorn*; and that in *Michaelmas* term they cauſed ſeparate actions to be brought in the Court of King's Bench againſt each of the plaintiffs, as underwriters upon the policy in the pleadings mentioned; that the deponent made application to Meſſ. *Weſton*, who commenced the ſaid actions for the defendants, as their attorneys at law, and requeſted them to accept *Subpœnas* for the defendants to the bill: but they refuſed to do ſo.

The *Regiſter* having objected to draw up the order for want of an affidavit of the merits to ſupport the injunction to ſtay proceedings at law, the motion was repeated.

1798.

STEPHEN v. CINI.

Mr. Thomſon in ſupport of the motion inſiſted that the practice of this Court, in conformity to that of the Court of *Exchequer*, does not require the affidavit of the merits till the motion for the injunction; and he relied on *Burke* v. *Vickars*, 3 *Cro. C. C.* 24.

Lord Chancellor granted the motion: but the Regiſter ſtill making a difficulty, the order was withheld; and it was not obtained, till the motion was repeated before the Maſter of the Rolls upon an affidavit of merits (*a*).

(*a*) *Fullarton* v. *Lady Wallace*, in *Chancery*, 29th of *January* 1799.

A ſimilar motion was made in this cauſe, and ſtood over ſeveral times.

Mr. Campbell in ſupport of the motion ſaid, he underſtood the practice of this Court agreed with that of the Court of *Exchequer*; and was ſettled by Lord *Thurlow* upon conſideration in *Burke* v. *Vickars*.

Lord Chancellor.—I underſtand, that caſe is totally denied, and the practice is always againſt it. Mr. *Dickins* ſays, it is contrary to the tenor of the orders in Lord *Thurlow*'s time.

Looking to the conſequences, it appears to me, that the reaſon of the thing and the convenience go much againſt ſuch a practice. According to that practice, the motion being of courſe, the injunction is obtained by ſurpriſe. In fact, I underſtand the Maſter of the Rolls never made ſuch an order, but always called for an affidavit of merits. In another cauſe (*Stephen* v. *Cini*) I had made the order: it was ſtopped in the Regiſter's Office; and they afterwards made the motion before the Maſter of the Rolls with an affidavit of merits.

As that caſe before Lord *Thurlow* ſtands in the book, I wiſh it to be mentioned, when the Maſter of the Rolls happens to be here.

The motion was not repeated: the object being obtained in another manner.

SIMMS *v.* NAYLOR.

Dec. 19.

Stock ordered to be transferred under the ſtatute 36 *G.* 3. *c.* 90; the truſtee being of unſound mind, tho' no Commiſſion had iſſued; and having actually refuſed to transfer: the refuſal proceeding from mere weakneſs of mind.

By the decree made in this cauſe the 26th of *July* 1798 it was ordered, that 6500*l.* 3 *per cent.* Conſolidated Bank Annuities and other ſtock ſtanding in the name of the defendant *Samuel Naylor* be transferred to the Accountant-General in truſt in the cauſe upon the truſts declared by the decree.

The defendant *Samuel Naylor* was of unſound mind, and had put in his anſwer by guardian: but no Commiſſion of Lunacy had been taken out.

A petition was preſented by the plaintiffs under the late *Act of Parliament* 36 *Geo.* 3. *c.* 90 (*a*), ſtating, that *Samuel Naylor*

(*a*) See an abſtract of that *Act*, *ante*, vol. 3. 25.

being unable to attend at the Bank, in order to transfer the ſtock, ſeveral applications were made to his ſon, the defendant *Thomas Naylor*, to procure a power of attorney to be executed by *Samuel Naylor* to transfer the ſtock purſuant to the decree: but *Thomas Naylor* refuſed to procure ſuch power, or to ſuffer the petitioners or any perſon on their behalf to have acceſs to his father.

The petition prayed, that the ſaid ſtock may be ordered to be transferred into the name of the Accountant-General in truſt in the cauſe according to the directions of the decree by the Secretary or Deputy Secretary for the time being of the Governor and Company of the Bank of *England*; or that the petitioners may be at liberty to apply for a Commiſſion of Lunacy.

The petition came on before the Maſter of the Rolls, ſitting for the Lord Chancellor; who thought, that as there had been no direct refuſal by *Samuel Naylor* to execute the power of attorney, it was proper that the parties ſhould be permitted to ſee him, and that there ſhould be a refuſal.

In conſequence of that the ſolicitor for the plaintiffs was admitted to *Samuel Naylor*; and aſked him to attend at the Bank, or to exeute a power of attorney. He anſwered "No: no: no:" theſe words appearing to proceed from mere weakneſs of mind.

The *Solicitor-General for the Petition* ſaid, it was conceived, that the neceſſity of taking out a commiſſion of lunacy might be avoided by making the order under the *Act* as in the caſe of a perſon refuſing to transfer.

Lord Chancellor made the order; obſerving, that it was clearly within the words of the *Act*; and he thought, the act had provided for the caſe; the preamble reciting the common caſes, and profeſſing to provide for other caſes, where the like inconvenience exiſts.

1798.

Rolls.
Dec. 11th, 13th, 20th.

Legacy at 21, the intereſt for maintenance, not ſatisfied by advancements during minority for the infant's benefit, nor by a legacy larger, but of a different nature, received under the will of the executor: there being no poſitive relinquiſhment; tho' no demand for ten years.

LEE *v.* BROWN.

MARTHA PYLE by her will, dated the 25th of *January* 1774, gave to her brothers *William* and *Edward Brown* the ſum of 100*l.*, upon truſt to place the ſame out at intereſt during the minority of here great-nephew *John Lee*, and to apply the intereſt and produce thereof for and towards the maintenance and education of her ſaid great-nephew; and, when he ſhould attain the age of 21, then to pay or otherwiſe transfer the ſaid ſum of 100*l.* to him: but in caſe he ſhould die, before his ſaid legacy ſhould become payable, ſhe gave his ſaid legacy among his brothers and ſiſters equally; and ſhe appointed her brothers *William* and *Edward Brown* executors.

After the death of the teſtatrix, which happened in 1774, both the executors proved the will; and *William Brown* expended much more than the intereſt of *John Lee*'s legacy by maintaining and educating him at ſchool. In 1781, *William Brown* put *John Lee* apprentice to a druggiſt at *Briſtol*; giving with him a fee of 100 guineas.

William Brown died in 1782 without iſſue; having by his will, dated the 4th of *March* in that year, directing his juſt debts to be paid, given a legacy to *John Lee* in the following words:

"I give to my great-nephew *John Lee* 200*l.*, which I direct "ſhall be paid to him when he attains the age of 22 years:"

He alſo gave legacies to the brothers and ſiſters of *John Lee*; and he appointed his brother *Edward Brown* executor.

John Lee in 1786 attained the age of 21; and in 1787 having attained the age of 22, he gave a power of attorney to —— *Orchard*, reciting the legacy of 200*l.* under the will of *William Brown*, and empowering *Orchard* to demand and receive for him all legacies left or to be left to him as well as other monies and effects due to him. Under that power of attorney *Orchard* applied to *Edward Brown*, as executor of his brother, for payment of the legacy of 200*l.*; which *Edward* *Brown*

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v.
Brown.

Brown paid to him on the 9th of *March* 1787 for the uſe of *John Lee*; and *Orchard* gave a receipt of that date for the ſame. Upon that occaſion no notice was taken of the legacy of 100*l.* under the will of *Martha Pylé*; nor was any demand of that legacy made, till this Bill was filed in 1797 by *John Lee*, who was then in the ſituation of a ſtage-coachman, againſt his uncle *Edward Brown*; praying that the ſaid legacy of 100*l.* might be paid to him with intereſt.

The defendant by his anſwer inſiſted, that the legacy of 100*l.* given to the plaintiff by the will of *Martha Pyle* was ſatisfied. The anſwer farther ſtated, that during the apprenticeſhip of the plaintiff *William Brown* paid him eighteen guineas, beſides declaring, that he would afterwards give him the ſum of 200*l.* to ſet him up in buſineſs. The defendant admitted aſſets.

There was evidence of declartions by *William Brown*, that what he had advanced for the plaintiff was advanced as the legacy due to him.

Mr. Short for the plaintiff.—With reſpect to the objection from the apprentice-fee, the legacy of 100*l.* to the plaintiff being contingent upon his attaining the age of 21, the defendant was guilty of a breach of truſt by ſuch an application of it. The legatee was than only ſixteen.

As to the legacy of 200*l.*, wherever a legacy has been held a ſatisfaction, there has been either evidence or a ſtrong preſumption of that intention (*a*). In this caſe the preſumption is againſt it. The promiſe ſtated in the anſwer to give the plaintiff 200*l.* to ſet him up in buſineſs totally excludes the idea of ſatisfaction. There is nothing in the will, from which an intention to ſatisfy can be preſumed. The teſtator was a man of property, and had no children of his own; therefore the plaintiff was the natural object of his bounty. The debt was due by the teſtator in the character of executor: the legacy was given by him in his own character. The two legacies are payable at different times; the

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(*a*) See *Chancey's caſe*, 1 *P. Wms.* 408, and Mr. *Cox's* note. *Richardſon* v. *Elphinſtone*, *ante*, vol. 2. 463. Vol. 3. 466; 529; 564. The Court inclines equally againſt the ſtrict rule of ſatisfaction, where a parent has given a legacy to a child, to whom he is indebted. *Tolſon* v. *Collins*, *poſt*.

one contingent, the other abſolute. In that caſe there can be no ſatisfaction: *Crompton* v. *Sale*, 2 *P. Will.* 553. He directs his debts to be paid. That direction has in many caſes been much relied on. Suppoſe, the plaintiff had died under the age of 21. In that event the legacy of 100 *l.* is given over.

Mr. Graham and Mr. King for the defendant.—Such a ſuit as this is not to be countenanced. The plaintiff being an orphan, his uncle took him under his care, placed him at ſchool, paid for his education, for which no other fund exiſted than the intereſt of this legacy of 100*l.*, and maintained him during his very long infancy, and put him out apprentice, paying upon that occaſion 100 guineas. I do not not contend upon the point of ſatisfaction: but upon all the circumſtances and after acquieſcence for ten years the Court will preſume any thing againſt ſo unwarrantable a claim. *Dagley* v. *Tolferry*, 1 *Eq. Ca. Ab.* 300, alſo reported, but with leſs accuracy and leſs particularity as to the ground of the judgment, in 1 *P. Wms.* 285 (*a*), comes very near this. Lord *Cowper* was ſo much againſt the claim as to order the depoſit to be divided. In *Philips* v. *Paget*, 2 *Atk.* 81. Lord *Hardwicke* thinks the rule (*b*), as it is laid down in *Peere Williams*, is carried to far; and that the caſe muſt have had other circumſtances. The Report in *Equity Caſes Abridged* is therefore moſt probably correct. The ſingle circumſtance, that determined Lord *Cowper* to have the money paid over again, was, that the father had told the ſon, with whom he was engaged in trade, that he would receive and account for it.

The power of attorney was given upon the plaintiff's inſolvency. He did not then chooſe to mention this legacy; but now brings forward this claim with a view to put the money in his own pocket to the prejudice of his creditors. The ground of the defence is a preſumed relinquiſhment. Upon the circumſtances the bill ought to be diſmiſſed with coſts.

Reply.—The plaintiff was unfortunate in loſing his parents, and the uncle, who took care of him. The power of attorney is a proof of his diſtreſs and honeſty. It alſo proves that the defendant was not well inclined to him. There is no ſuggeſtion,

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(*a*) See alſo *Gilbert's Equity Rep.* 103.

(*b*) See *Davies* v. *Auſten*, 3 *Bro. C. C.* 178; *ante*, vol. 1. 247.

that the plaintiff at that time knew any thing of this legacy, and relinquiſhed it. It appears, from the moment of his attaining the age of 21 he was in diſtreſs. That alone ſufficiently accounts for the delay in filing this bill. There is no ſuch bar in this court as nine or ten years. *William Brown* by his will made ample proviſion for the brothers and ſiſters of the plaintiff; and the defendant alſo takes conſiderable property under that will.

The caſes cited in point of deciſion are in the plaintiff's favor; proving, that payments to the parent are never tolerated.

Maſter of the Rolls.—Why did not the defendant take a releaſe for the one legacy as well as the other, or come to ſome ſettlement; eſpecially, when he ſaw the Letter of Attorney?

The queſtion is, whether the plaintiff, after he came of age, did any act, ſhewing, that he was ſatisfied. It depends entirely upon circumſtances. It is extremely material for the defendant to prove ſome ſort of acquieſcence. They muſt have had ſome meeting upon it, I ſhould think; and I am inclined to have an inquiry; and both parties to be examined upon interrogatories. This is not the caſe of a parent. The Court is very tender of binding children by payments to them, to their parents, or for their uſe, during their minority. It is plain, *William Brown* paid more than the legacy. All that would not do, if the plaintiff, when he came of age, did not think conſcientiouſly, that his uncle had diſcharged the legacy, and did not mean to relinquiſh it. It lies upon the defendant to prove, that the plaintiff did mean to accept what had been done as payment and ſatisfaction. It is extraordinary, and in oppoſition to that conſtruction, that if that was the caſe, the uncle ſhould be ſo careleſs as not to get the plaintiff to releaſe it, when the other legacy was paid. I think the bill ungracious: but I muſt judge according to the law, whether the plaintiff has accepted this as a ſatisfaction of his legacy.

Dec. 13th.

Maſter of the Rolls.—I am afraid, this cauſe is not ripe for judgment without more inquiry. It is proved, that *William Brown* declared, that what he had advanced was advanced by him as the legacy of 100*l.* due to the plaintiff; and he ſuppoſed himſelf competent to apply that legacy for the benefit of the plaintiff during his minority inſtead of paying it to him at the

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age of 21; in which moſt unqueſtionably he was miſtaken. The plaintiff having attained the age of twenty-one had a right then, if he thought fit, to call for the payment of that legacy, notwithſtanding the money ignorantly advanced for him by his uncle. The tranſaction, that took place with reſpect to the legacy of 200*l.* given by *William Brown* to the plaintiff cannot be accounted for, except upon the idea, that when he received that legacy by his attorney, he had entirely relinquiſhed any demand in reſpect of the legacy of 100*l.* upon the eſtate either of *Martha Pyle* or *William Brown*. At the ſame time it is very extraordinary, that the defendant, when he paid the other legacy ſhould not take any notice of or deſire a diſcharge for that legacy of 100*l.* Ten years after that tranſaction the bill is filed; inſiſting, that the legacy of 100*l.* was never ſatisfied; and it is admitted, that it never has been ſatisfied except by the payments made by *William Brown* during the minority of the plaintiff, and the legacy of 200*l.* paid by his executor: but it is inſiſted, that all the circumſtances and the length of time, that has elapſed, are ſufficient to rebut the demand; proving, that the plaintiff had accepted the payments made as a ſatisfaction.

I ſhould be very unwilling in a caſe like this to hold, that any payment for the benefit of an infant during his minority was a diſcharge of a legacy to him at the age of twenty-one: but if he thought fit with his eyes open and fully aware of his right to relinquiſh it, certainly it was competent to him to let thoſe payments operate as a diſcharge. If by any evidence it can be proved, that he conſidered them as a ſatisfaction, he ſhall not now claim the legacy: but after the caſes, that have been decided, I muſt be extremely cautious in holding payments for the benefit of an infant to be a ſatisfaction of a legacy to him at the age of twenty-one.

Dagley v. *Tolferry* and *Philips* v. *Paget* prove only, that this Court is extremely tender in binding infants by payments made during their minority (*a*); and the caſe of payment to the father, where after fifteen years the executor was compelled to pay again what was paid to the father, ſhews, how jealous the Court is upon that point. This caſe differs in ſome reſpects. The un-

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(*a*) See *Barlow* v. *Grant*, 1 *Vern.* 255.

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fortunate circumſtance is, that the ſum is ſo ſmall, that an inquiry will be very inconvenient: but if a man brings a bill under theſe circumſtances, he cannot complain, where it is neceſſary, that all the circumſtances ſhould be known; and I do not know, that I can do juſtice without an inquiry; for the whole depends upon circumſtances. It may or may not have been accepted by the plaintiff. The evidence is not ſufficient to ſhew, that it was. In *Philips* v. *Paget* Lord *Hardwicke* was ſo ſtruck with the hardſhip, that he almoſt drove the parties into ſomething of a compromiſe. I muſt take care, that the executor is not injured; and if the plaintiff was ſatisfied, and conſidered himſelf ſatisfied, I will not let him now raiſe this claim. There is no preſumption of ſatiſfaction in any other way. The period of ten years, on which ſo much reliance is placed, does not afford any pretence of any other payment. It is plain, the plaintiff got only the legacy of 200*l.* and the ſums advanced during his minority by the miſtake of his other uncle. The *onus* lies upon the executor to prove, that the plaintiff conſidered himſelf ſatisfied; and acquieſced with his eyes open, knowing, that he might have demanded this legacy.

The counſel for the plaintiff objecting to an inquiry on account of the expence, the Maſter of the Rolls ſaid, he would give judgment in a few days.

Dec. 20th.

Maſter of the Rolls.—I have looked into theſe caſes. I obſerve in *Cooper* v. *Thorton*, 3 *Bro. C. C.* 96, 186, in which my decree was affirmed by Lord *Thurlow*, I took notice, that in *Dagley* v. *Tolferry* the Maſter of the Rolls gave no intereſt: but he gave coſts; and in *Philips* v. *Paget* Lord *Hardwicke* ſo much diſcountenanced the Bill, that he in ſome degree forced the parties into a compromiſe. This caſe is very different from *Dagley* v. *Tolferry* in this circumſtance; that theſe payments were not made to the father of the legatee; but were made abſolutely for his own benefit. Conſequently any thing affirming it, after he was of age, would be ſufficient. There is nothing to fix him here but his own conſciouſneſs, that it ought to be affirmed. This is a very ungracious demand; and it will be with great reluctance that I ſhall give the plaintiff any thing: but I think, I cannot diſmiſs his bill. I do not feel, that ſince he came of age he has done any thing to affirm this (*a*). If I am to give judgment, I have no difficulty in giving the 100 *l.* with intereſt from the time of filing the bill: but I will give no coſts on either ſide.

There was no power in the executors of *Martha Ryle* to apply more than the intereſt of this legacy for the maintenance of the legatee. They were not at liberty under the truſt repoſed in them to advance any part of the capital; though it would have been ever ſo much for his benefit. In 1786, when the plaintiff attained the age of twenty-one, if with his eyes open, upon full conſideration of all, that had been done for him during his minority, he had by any act admitted, that the advancement had been for his benefit, and he was willing to accept it as a ſatisfaction, it was unqueſtionably competent to him to do ſo: but the fact is, that coming of age after the death of his uncle he never made any demand: but in 1787, being in ſome diſtreſs I ſuppoſe, for ſome reaſon, whether it was neceſſary for him to keep out of the way, ſo that he could not perſonally demand it, does not appear, he executed a Letter of Attorney to enable another perſon to receive all legacies and other monies due to him. Under this Letter of Attorney that perſon received the legacy of 200 *l.* bequeathed to the plaintiff by his uncle, and no more; and he gave a receipt for that ſum and for nothing elſe; and no notice was taken of the legacy of 100 *l.* due under the will of *Martha Pyle*. The plaintiff has now reſted for ten years; and, whether from the increaſing diſtreſs of his circumſtances or for what other reaſon I do not know, he now brings forward this claim; inſiſting, that this legacy of 100 *l.* was never ſatisfied. It certainly was not ſatisfied by the legacy of 200 *l.* That was never accepted as a ſatisfaction.

The queſtion then is, whether this Court ought to declare the plaintiff ſtill entitled to this legacy ſo neglected to be called for by him, when he ought to have called for it. *Dagley* v. *Tolferry* was much relied on in *Cooper* v. *Thornton*; which went off upon a different ground; Lord *Thurlow* being of the ſame opinion with me, that under the will the payment to the father was good. Upon that occaſion I looked much into *Dagley* v. *Tolferry*; which was determined by Sir *John Trevor*; whoſe decree was upon an

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(*a*) The Maſter of the Rolls here propoſed a compromiſe.

appeal affirmed by Lord *Cowper* upon this ground, that payments to infants during their minority ought to be diſcountenanced by this Court; that an executor at his own peril makes advances; of which the infant may complain, when he comes of age.

Payments to infants during minority to be diſcountenanced.

It certainly was not competent under this truſt to the executor, nor could he, if he had applied, have obtained permiſſion from this Court, to advance any part of the capital of the legacy in putting the child out in the world; for if it had been ſuch a caſe, that the Court would have authoriſed the act, that was done, I deſire to be underſtood, that it would be conſidered as properly done; for that principle has been eſtabliſhed ſince *Andrews* v. *Partington* (*a*), that if an executor does without application what the Court would have approved, he ſhall not be called to account, and forced to undo that, merely becauſe it was done without application. The uncle, who died, put himſelf ſo far *in loco parentis*, that the infant has a right to ſay, he does not know, his uncle did not mean to make him a preſent of that money. The queſtion is, whether he meant to take it as a ſatisfaction, to affirm the acts of the uncle; and I am of opinion, that what the plaintiff has done is not complete evidence of his having ſo aſſented; and therefore, though I am diſſatiſfied with the demand, and think, that if motives of honor and conſcience had weighed with the plaintiff, he would not have made it, I cannot hold it ſatiſfied.

If an executor without application to the Court does what the Court would have approved, it ſhall ſtand.

As to the coſts, in *Dagley* v. *Tolferry* the infant loſt the benefit of his legacy: in this caſe he gets the benefit of it. Under the circumſtances I cannot give intereſt or coſts.

Decree, that the defendant ſhall pay the plaintiff the legacy of 100*l.* with intereſt from the time of filing the Bill at the rate of 4 *per cent.*: but I give no coſts on either ſide.

(*a*) 3 *Bro. C. C.* 60; 401.

1798.

Rolls.
Dec. 11th,
21ſt.

SPENCER *v.* BOYES.

Copyhold lands mortgaged in fee by leaſe and releaſe as freehold: the cuſtomary heir is bound by a covenant for farther aſſurance: but during his infancy the Court refuſed to forecloſe; and would go no farther than directing the account, and that in default of payment the plaintiffs ſhould be let into poſſeſſion, and hold and enjoy, till the heir ſhould attain twenty-one, at which time he ſhould ſurrender; and a day was given to ſhew cauſe againſt the decree.

By indentures of leaſe and releaſe certain premiſes were conveyed to —— *Spencer*, his heirs and aſſigns, by way of mortgage by *Rachael Boyes* and *Edward Boyes*, her ſon; and the ſaid indentures contained covenants by *Rachael* and *Edward Boyes*, that they were ſeiſed in fee, and had a right to convey in fee, and for farther aſſurance.

The mortgaged premiſes were in fact copyhold eſtate; which according to the cuſtom of the manor deſcended to the youngeſt ſon. At the time the mortgage took place *Rachael Boyes* had been admitted to the cuſtomary eſtate; and *Edward Boyes* was cuſtomary heir expectant on the determination of her eſtate. *Edward Boyes* died in the life of his mother, having never been admitted, or had any eſtate in poſſeſſion. He left two ſons, *Edward* and *Benjamin*.

The Bill was filed by the executors of the mortgagee againſt *Benjamin Boyes*, the cuſtomary heir, an infant; praying, that he may be decreed to ſurrender the eſtate to the uſe of the plaintiffs; and that an account may be taken of what is due to them for principal, intereſt, and coſts; and that in default of payment the defendant may be forecloſed.

Mr. Graham and Mr. King for the plaintiffs preſſed for a decree for a ſurrender and a forecloſure at once.

Maſter of the Rolls.—I am clearly of opinion, that this covenant is a contract for valuable conſideration affecting the land, and will affect the heir: but can I direct this infant heir to ſurrender, while he is an infant, and accompany that decree for a ſurrender with a decree for forecloſure? The plaintiffs muſt firſt get the eſtate conveyed to them, before I can direct any account againſt him. He is not a mortgagor yet. They will find it very difficult to forecloſe him, till he comes of age. They come againſt the infant heir, firſt to get the legal eſtate, and then to forecloſe. It would be plain againſt an adult: but as againſt an infant heir I have great doubt.

1798.

Spencer v. Boyes.

It is a caſe, that ought to be well attended to as a precedent. I will conſider of it.

Dec. 21ſt.

Mr. Graham for the plaintiffs gave up the point as to the foreclosure; and deſired a decree, declaring, that the covenant bound the land, and directing an account of what is due for principal, intereſt, and coſts; and that a day ſhould be appointed for payment; and that, if the money ſhould not be paid, the plaintiffs ſhall be let into poſſeſſion, and ſhall hold and enjoy, till the infant comes of age.

Maſter of the Rolls.—I may go ſo far againſt an infant: but no farther; and he muſt have a day to ſhew cauſe after he comes of age. Then you may go on with your foreclosure: but I will not give the two ſteps now. You come for a favor againſt an infant.

By the decree it was declared, that the covenant in the mortgage deed bound the land deſcended to the defendant; and it was referred to the Maſter to take an account of what was due to the plaintiffs for principal and intereſt upon the mortgage, and to tax their coſts of this ſuit; and upon the defendant's paying to the plaintiffs what ſhall be reported due for principal, intereſt, and coſts, within ſix months after the Maſter ſhall have made his Report, at ſuch time and place as the Maſter ſhall appoint, the plaintiffs were directed to reconvey ſuch mortgaged premiſes to the defendant clear of all incumbrances, and to deliver up upon oath all deeds, papers, *&c*, relating thereto: but in default of the defendant's paying to the plaintiffs what ſhall be reported due to them for principal, intereſt, and coſts, as aforeſaid, by the time aforeſaid, the plaintiffs were to be let into poſſeſſion of the ſaid mortgaged premiſes, and to hold and enjoy the ſame as againſt the defendant, until he ſhall attain the age of twenty-one years; and upon his attaining his age of twenty-one years, the defendant was directed to ſurrender the ſaid mortgaged premiſes to the plaintiffs upon the truſts of the ſaid indenture; and this decree was declared to be binding upon the ſaid defendant, unleſs upon being ſerved with a *Subpœna* to ſhew cauſe he ſhall within ſix months after he ſhall attain the age of twenty-one ſhew cauſe to the contrary.

1798.
Dec. 22d.

Ex parte TOOTELL.

Promiſory note to pay, when the circumſtances of the drawer will admit without detriment to himſelf or family, creates no debt.

THOMAS HOLDS being indebted to the Petitioner in reſpect of the balance of a debt of 100*l.* for goods ſold and delivered gave him the following note:

"I hereby promiſe to pay to *Richard Tootell* 50*l.* at ſuch a "period of time that my circumſtances will admit without detri- "ment to myſelf or family and not to be diſtreſſed upon any "account whatſoever until ſuch time that my circumſtances will "be as above deſcribed.

"THOMAS HOLDS."

After having given this note *Holds* became embarraſſed in his circumſtances; and he aſſigned his eſtate and effects to truſtees for the benefit of his creditors. The Petitioner executed the deed; and it was intended, that he ſhould receive a compoſition: but as *Holds* had committed an act of bankruptcy, and ſome of the creditors refuſed to come in, a Commiſſion was taken out.

The Commiſſioners having rejected the proof under the note above ſtated, the petition was preſented; praying, that the Petitioner might be at liberty to prove his debt.

Mr. Alexander in ſupport of the petition compared it to the caſe of a bond with a defeazance.

Mr. Fonblanque for the aſſignees.

LORD CHANCELLOR.—Upon a promiſory note to pay, when the drawer ſhall be in good circumſtances, the Court of Common Pleas thought, no action could be brought. I confeſs, I was of opinion, that it was an abſolute promiſe: but the Court was moved upon it; and they held, that an action did not lie without proving, that he was in good circumſtances. There was no ſuch proof given: nor do I ſee, how it is poſſible in an action to prove, that a man is in good circumſtances. I take the caſe to amount to this, that it is no promiſory note.

Diſmiſs the petition.

[*To front Vol.* IV. *p.* 373.

Ex parte WALKER.

SKETCH OF THE ACCOUN

ACCOUNT OF DISHONORED BILLS.

Bad bills received from
Caldwell and Co. by the
House of *Browne* 204,910*l.* 5*s.* 1*d.*

Not negotiated 8,320*l.* 18*s.* 9*d.*
Negotiated . 196,589*l.* 6*s.* 4*d.*

Drawn by different perſons 8,462*l.* 11*s.*
Drawn by *Caldwell* and Co.
on *Forbes* and *Gregory* 188,126*l.* 15*s.* 4*d.*

Ac

Proved againſt *Caldwell* and Co. 191,29

Claimed againſt *Caldwell* and Co. 4,130*l.* 13*s.*
Proved againſt *Browne* . . 57,121*l.* 4*s.*
Exhibited as ſecurities for
46,414*l.* 2*s.* 8*d.* againſt *Browne* 85,621*l.* 6*s.*
Claimed againſt *Browne* . 22,710*l.* 17*s.*

Bad bills received from
the House of *Browne*
by *Caldwell* and Co. 305,149*l.* 19*s.* 10*d.*

Not negotiated 178,294*l.* 8*s.*
Negotiated 126,855*l.* 11*s.* 10*d.*

To different perſons 22,965*l.* 1*s.* 9*d.*

Prove

Prov
we

To *Forbes* and *Gregory* . . 103,

Some dividends received by the Holders from the Eſtates of the Acceptors.
Returned not accepted 17,580*l.*

CASH ACCOUNT.

Balance in favor of *Caldwell*
and Co. at the bankruptcy 40,716*l.* 0*s.* 8*d.*

Proof for *Caldwell* and Co.
againſt *Browne*, in reſpect
of the Caſh Balance 139,488*l.* 10*s.* 6*d.*

Reduced by conſent to 132,694*l.*

UNTS.

LS.

d.

Accepted by and proved againſt *Forbes* and *Gregory*, by the Holders . . . 141,499*l.* 7*s.* 2*d.*

Dividend at 2*s.* 6*d.* in the pound 17,687*l.* 8*s.* 4*d.*

91,292*l.*

Dividend at 3*s.* in the pound 28,693*l.* 16*s.*

13*s.* 3*d.*
4*s.* 3*d.*
6*s.* 4*d.*
17*s.* 8*d.*

Dividend at 2*s.* 3*d.* in the pound 11,647*l.* 14*s.* 6*d.*

Proved againſt *Browne* 19,632*l.* 2*s.* 2*d.*

Dividend at 2*s.* 3*d.* in the pound 2,208*l.* 12*s.* 3*d.*

Proved againſt *Caldwell* and Co. . . 16,517*l.* 11*s.* 9*d.*

Dividend at 3*s.* in the pound 2,477*l.* 12*s.* 6*d.*

103,890*l.* 10*s.* 1*d.*

Returned to *Forbes* and *Gregory* not accepted 12,800*l.*

Proved by the Aſſignees of *Forbes* and *Gregory* againſt *Browne*; the difference ariſing by Dividends received from other Eſtates 100,744*l.* 12*s.* 10*d.*

Dividend at 2*s.* 3*d.* in the pound 11,333*l.* 15*s.* 4*d.*

Compromiſed between the Eſtate of *Forbes* and *Gregory* and the Eſtate of *Caldwell* and Co.

Stated as part of the ſecurities for the balances of the Caſh and Bill Accounts, upon the proof for the Eſtate of *Caldwell* and Co. againſt *Browne*.

94*l.* 2*s.* 6*d.*

Dividend ordered only upon 26,999*l.* 12*s.* 5*d.*
Reſtrained as to the reſidue.

1798.
Dec. 22d, 24th.

Croſs paper between two houſes; both of which become bankrupt: as between the two eſtates no proof can be made in reſpect of the bad paper or the exceſs of damage eventually ſuſtained on that account.

Ex parte WALKER.

The houſes of *Caldwell* and Co. and of *George Browne* and *Henry Brown* were conſiderable houſes of trade at *Liverpool*: the former acting as bankers; the latter being general merchants. On the 23d of *March* 1793 a Commiſſion of bankruptcy iſſued againſt *Caldwell* and Co.; under which they were declared bankrupts; and in the ſame month the houſe of *Browne* alſo was declared bankrupt. The aſſignees of *Caldwell* and Co. claimed to prove and receive dividends to a very large amount under the Commiſſion againſt the houſe of *Browne*. This produced a petition by the Aſſignees of *Caldwell* and Co. to the Lord Chancellor; upon which by an order, dated the 13th of *May* 1797 his Lordſhip ordered, that it ſhould be referred to *Robert Richmond* Eſq. *William Roſcoe* Eſq. and *Joſhua Lace* Eſq., all of *Liverpool*, to take an account of all dealings and tranſactions between the houſe of *Caldwell* and Co. and the houſe of *Browne* before the date of the Commiſſions iſſued againſt them; and to inquire into and ſtate the caſh account and alſo the bill account between the ſaid two houſes, as they reſpectively ſtood at the time of their bankruptcy, and as they might ſtand at the time of making ſuch ſtatement; and to ſtate any other particulars, they might think material; and further directions were reſerved.

Upon the certificate made under that order the dealings and tranſactions between theſe houſes and the proceedings under the reſpective Commiſſions ariſing out of their connection appeared to be in ſubſtance as follows.

Charles Caldwell and *Thomas Smyth* for ſeveral years previous to their bankruptcy were reſident in *Liverpool*; and *John Forbes* and *Daniel Gregory* were reſident in *London*; where they carried on the buſineſs of merchants under the firm of *Burton*, *Forbes*, and *Gregory*. In the year 1774 *Caldwell* and *Smyth* entered into partnerſhip with *Forbes* and *Gregory* in the buſineſs of bankers at *Liverpool*, under the firm of *Caldwell* and Co.: but *Forbes* and *Gregory* continued to reſide and carry on their buſineſs as merchants in *London* as a ſeparate and diſtinct concern for their own uſe and benefit.

Caldwell and Co. in the courſe of their buſineſs and for the purpoſe of carrying it on drew bills of exchange on *Forbes* and *Gregory* in *London* under the firm of *Burton*, *Forbes*, and *Gregory*; which were paid or negotiated, and were uſually accepted by *Forbes* and *Gregory*, and before their bankruptcy were paid, when they became due. To enable *Forbes* and *Gregory* to take up ſuch bills, or to reimburſe them for what they paid, *Caldwell* and Co. remitted bills of exchange received by them in the courſe of their buſineſs; which bills were placed to the credit of *Caldwell* and Co. in account with *Forbes* and *Gregory*. Theſe negotiations and tranſactions continued to the time of the bankruptcy of *Forbes* and *Gregory*.

Various tranſactions in buſineſs had for ſeveral years prior to the bankruptcy of *Caldwell* and Co. taken place between *Caldwell* and Co. and *George Browne* and *Henry Brown*; who carried on the buſineſs of merchants at *Liverpool*; in the courſe of which *Caldwell* and Co. paid or advanced conſiderable ſums, as well in caſh as bills of exchange, to the houſe of *Browne*; the greater part of which bills were drawn by *Caldwell* and Co. on *Forbes* and *Gregory*. The houſe of *Browne* alſo paid to *Caldwell* and Co. from time to time caſh and bills of exchange; and an account in the nature of a banking account was kept between *Caldwell* and Co. and the houſe of *Browne*; upon which intereſt was reciprocally paid and allowed, and a commiſſion of 5*s*. for every 100*l*. was charged by *Caldwell* and Co. to the houſe of *Browne*; which is the uſual charge made by bankers on ſuch tranſactions in *Liverpool*. The account was ſettled at the end of every three months; and a balance ſtated, and carried forwards to the debit or credit of the reſpective parties, as the caſe might be. An account was ſettled between the two houſes on the 28th of *February* 1793; upon which a balance of 5090*l*. 11*s*. 4*d*. appeared to be due from *Caldwell* and Co. to the houſe of *Browne*; which was carried forward to their credit. The accounts ſo ſettled conſiſted principally of bills to a large amount advanced by the reſpective parties to each other; which at the time of the laſt account were in a courſe of circulation; and many of the bills included in that account were not eventually paid. The dealing between the two houſes ſtill continued: and bills of exchange to a large amount were mutually paid or advanced: but no farther ſettlement took place prior to the bankruptcy of *Caldwell* and Co.; which happened on the 18th of *March* 1793.

Upon the ſtatement of the accounts, as they ſtood at the time of the bankruptcy of *Caldwell* and Co. the following reſult appeared.

The caſh account was formed not only of the payments in caſh, but alſo by ſelecting out of the bill account the payments made by each party by bills duly honored.

The bill account conſiſted of the paper on both ſides without regard to its ſolidity. Upon the 18th of *March* 1793, the time of the bankruptcy of *Caldwell* and Co., bills to a very conſiderable amount were in a courſe of circulation, and unpaid.

On the caſh account there was due from the houſe of *Browne* to *Caldwell* and Co. at the time of their bankruptcy the ſum of 40,716*l.* 0*s.* 8*d.*

The bill account ſtood thus. Of the bills paid by the houſe of *Browne* to *Caldwell* and Co., as well before the 28th of *February* 1793, the date of the laſt ſettled account, as in the interval between that day and the bankruptcy of *Caldwell* and Co. and for which the houſe of *Browne* had credit, bills to the amount of 305,149*l.* 19*s.* 10*d.* proved bad, and were diſhonored: but of thoſe bad bills ſome, to the amount of 103,890*l.* 10*s.* 1*d.* had been remitted by *Caldwell* and Co. to *Forbes* and *Gregory*; and had been proved by their aſſignees under the commiſſion againſt the houſe of *Browne*; and a dividend had been received on that proof by an order of the Lord Chancellor.

Of the bills paid by *Caldwell* and Co. to the houſe of *Browne*, and for which *Caldwell* and Co. had credit, bills to the amount of 204,910*l.* 5*s.* 1*d.* were diſhonored, and proved bad. Upon the amount of the bad bills the balance in favor of *Caldwell* and Co. amounted to 100,239*l.* 14*s.* 9*d.* This ſum being added to the caſh balance of 40,716*l.* 0*s.* 8*d.* made the ſum of 140,955*l.* 15*s.* 5*d.*

Of the bad bills paid by *Caldwell* and Co. to the houſe of *Browne* they negotiated to different perſons part, to the amount of 196,589*l.* 6*s.* 4*d.* The reſidue of thoſe bills, to the amount of 8,320*l.* 18*s.* 9*d.*, were retained by the houſe of *Browne*, or had been returned, and remained in the hands of their aſſignees.

Of the bills ſo negotiated by the houſe of *Browne* part, to the amount of 188,126*l.* 15*s.* 4*d.*, were drawn by *Caldwell* and Co. on *Forbes* and *Gregory*; and the remainder, amounting to the ſum of 8,462*l.* 11*s.* 0*d.*, conſiſted of bills drawn by other perſons, which had come to the hands of *Caldwell* and Co. in the courſe of their buſineſs, and were by them paid and indorſed to the houſe of *Browne*.

Of the bills for 188,126*l.* 15*s.* 4*d.*, drawn by *Caldwell* and Co. on *Forbes* and *Gregory*, they accepted to the amount of 141,499*l.* 7*s.* 2*d*; and thoſe acceptances were proved under the Commiſſion iſſued againſt them by the perſons, to whom they were negotiated by the houſe of *Browne*; and a dividend of 2*s.* 6*d.* in the pound was on the 14th of *April* 1796 ordered thereon; which dividend amounts to the ſum of 17,687*l.* 8*s.* 4*d.* The reſidue of the ſaid ſum of 188,126*l.* 15*s.* 4*d*, being 46,627*l.* 8*s.* 2*d.*, was not proved againſt the eſtate of *Forbes* and *Gregory*.

Of the bills paid by *Caldwell* and Co. to the houſe of *Browne*, and negotiated, the whole amount, *viz.* 196,589*l.* 6*s.* 4*d.* was proved or claimed under the Commiſſion againſt *Caldwell* and Co., except the ſum of 1,166*l.* 13*s.* 1*d.*; the ſum of 191,292*l.* 0*s.* 0*d.* having been proved; and two dividends, amounting in the whole to 3*s.* in the pound, and making the ſum of 28,693*l.* 16*s.* 0*d.*, having been ordered upon ſuch proofs; and the ſum of 4,130*l.* 13*s.* 3*d.* having been claimed.

Of the bills paid by *Caldwell* and Co. to the houſe of *Browne*, and by them indorſed and negotiated, bills to the amount of 57,121*l.* 4*s.* 3*d.* were proved under the Commiſſion againſt the houſe of *Browne*.

Others of ſuch bills, to the amount of 85,621*l.* 6*s.* 4*d.* were indorſed and negotiated by the houſe of *Browne* to perſons, with whom they had at the time of their bankruptcy unliquidated accounts. The holders of theſe bills being creditors of the houſe of *Browne* to the amount of 46,414*l.* 2*s.* 8*d.* only, that ſum only was proved againſt the eſtate of *Browne*, and the bills exhibited as ſecurities.

Upon the ſaid ſums of 57,121*l.* 4*s.* 3*d.* and 46,414*l.* 2*s.* 8*d.* a dividend of 2*s.* 3*d.* in the pound, amounting in the whole to the ſum of 11,647 *l.* 14 *s.* 6 *d.* was ordered under the commiſſion againſt the houſe of *Browne*.

Others of the ſaid bills ſo paid by *Caldwell* and Co. to the houſe of *Browne* and negotiated by them, to the amount of 22,710 *l.* 17 *s.* 8 *d.*, were claimed under the commiſſion againſt that houſe; and the reſidue of the ſaid bills for 196,589 *l.* 6 *s.* 4 *d.*, amounting to the ſum of 31,135 *l.* 18 *s.* 1 *d.*, were neither proved nor claimed under that Commiſſion.

Of the bad and diſhonored bills advanced and paid by the houſe of *Browne* to *Caldwell* and Co., amounting to the ſum of 305,149 *l.* 19 *s.* 10 *d.*, part, to the amount of 178,294 *l.* 8 *s.* 0 *d.*, were not negotiated, but remained in the hands of *Caldwell* and Co. at the time of their bankruptcy, and from that time were in the poſſeſſion of their aſſignees. The reſidue of ſuch bills, amounting to the ſum of 126,855 *l.* 11 *s.* 10 *d.*, were indorſed and negotiated by *Caldwell* and Co.: part, to the amount of 103,890 *l.* 10 *s.* 1 *d.*, having been remitted and indorſed by them to *Forbes* and *Gregory*, and the reſidue, amounting to the ſum of 22,965 *l.* 1 *s.* 9 *d.*, were negotiated by *Caldwell* and Co. to divers perſons in the courſe of their buſineſs in *Liverpool*.

The bills paid by the houſe of *Browne* to *Caldwell* and Co., and negotiated by them, amounting to the ſum of 126,855 *l.* 11 *s.* 10 *d.*, were drawn by the houſe of *Browne* upon ſeveral perſons in *London*, *Hamburgh*, and *Liverpool*. Moſt of them were accepted; but the acceptors afterwards becoming inſolvent, the holders received dividends from their reſpective eſtates. Part, to the amount of 17,580 *l.*, were not accepted, but were returned for non-payment; and a part thereof, to the amount of 12,800 *l.*, were returned to *Forbes* and *Gregory*, and compoſed a part of the ſaid ſum of 103,890 *l.* 10 *s.* 1 *d.* remitted by *Caldwell* and Co. to *Forbes* and *Gregory*.

The aſſignees of *Caldwell* and Co. proved under the Commiſſion againſt the houſe of *Browne* in reſpect of the caſh balance between the parties the ſum of 139,482 *l.* 10 *s.* 6 *d.*; which was afterwards reduced with the aſſent of the aſſignees of *Caldwell* and Co. to 132,694 *l.* 2 *s.* 6 *d.*; and the aſſignees by their affidavit in proof of that debt, among other ſecurities held by them, as well for the caſh balance as for the balance on the bill accounts between the

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parties, ſtated the ſaid bills ſo received from the houſe of *Browne*, amounting to 103,890 *l.* 10 *s.* 1 *d.*, indorſed and remitted by *Caldwell* and Co. to *Forbes* and *Gregory*. But the aſſignees of *Forbes* and *Gregory* having ſince proved a debt of 100,744 *l.* 12 *s.* 10 *d.* under the Commiſſion againſt the houſe of *Browne* in reſpect of the ſaid bills, (the reduction in the amount ariſing by dividends received from other eſtates liable to the payment,) the Commiſſioners reſtrained the dividend, that would have become payable to the aſſignees of *Caldwell* and Co. in reſpect of the ſum of 100,744 *l.* 12 *s.* 10 *d.*; and ordered the aſſignees of the houſe of *Browne* to pay to the aſſignees of *Caldwell* and Co. a dividend on the ſum of 26,999 *l.* 12 *s.* 5 *d.* only, and to retain ſufficient to make a like dividend on the ſum of 100,744 *l.* 12 *s.* 10 *d.*, when the right to it ſhould be eſtabliſhed by the aſſignees of *Caldwell* and Co.

No proof was made by the aſſignees of *Forbes* and *Gregory* under the commiſſion againſt *Caldwell* and Co. in reſpect of the ſum of 103,890 *l.* 10 *s.* 1 *d.*; a compromiſe having taken place between the reſpective aſſignees by indenture, dated the 4th of *January* 1796. But a dividend upon the ſaid ſum of 100,744 *l.* 12 *s.* 10 *d.* was ordered by the Commiſſioners under the Commiſſion againſt the houſe of *Browne* to be paid to the aſſignees of *Forbes* and *Gregory* under an order of the Lord Chancellor, dated the 11th of *April* 1796; which dividend, amounting to the ſum of 11,333 *l.* 15 *s.* 4 *d.*, being 2 *s.* 3 *d.* in the pound, was paid accordingly.

Of the reſidue of the bills paid by the houſe of *Browne* to *Caldwell* and Co., and by them negotiated, amounting to the ſum of 22,965 *l.* 1 *s.* 9 *d.*, a part, amounting to 19,632 *l.* 2 *s.* 2 *d.*, were proved by the holders under the Commiſſion againſt the houſe of *Browne*; and a dividend of 2 *s.* 3 *d* in the pound, amounting to the ſum of 2,208 *l.* 12 *s.* 3 *d.* was ordered thereon: but the reſidue of thoſe bills, amounting to 3,332 *l.* 19 *s.* 7 *d.* were not proved or claimed under that Commiſſion.

Of the ſaid bills, amounting to the ſum of 22,965 *l.* 1 *s.* 9 *d.*, a part, amounting to the ſum of 16,517 *l.* 11 *s.* 9 *d.*, were proved under the Commiſſion againſt *Caldwell* and Co.; and two dividends were paid thereon, amounting to the ſum of 2,477 *l.* 12 *s.* 6 *d.*

The petition, which produced this Certificate ſtated the dealings between theſe houſes and the proceedings under the Commiſſions of bankruptcy; and ſuggeſted as the reſult, that the eſtate of *Caldwell* and Co. had been much injured, and that of the houſe of *Browne* benefited, in the following particulars:

Of the bills advanced by *Caldwell* and Co. to the houſe of *Browne*, and negotiated by them, as to thoſe drawn by other perſons and indorſed by *Caldwell* and Co., they had paid or accounted for the value; and for thoſe drawn on *Forbes* and *Gregory* by *Caldwell* and Co. they had made remittances; and the whole of thoſe bills (with a few exceptions) were accepted by *Forbes* and *Gregory*, and had been proved under the Commiſſion againſt *Caldwell* and Co. and alſo under the Commiſſion againſt *Forbes* and *Gregory*; and dividends had been paid out of both eſtates: ſo that in effect the eſtate of *Caldwell* and Co. is injured to the amount of the dividends paid by both eſtates on thoſe bills and the dividends paid on their indorſements on the other bills, as well as by dividends paid on *Browne*'s bills, which *Caldwell* and Co. had iſſued and indorſed, except ſuch dividends as may have been received by the proof againſt *Browne*'s eſtate on their drafts negotiated by *Caldwell* and Co.

The bills advanced to *Caldwell* and Co. by the houſe of *Browne* and not negotiated were not negotiated at their requeſt.

The dividends paid by the eſtate of *Forbes* and *Gregory* were charged or eſtimated in the arrangement of the accounts between the eſtates of *Caldwell* and Co. and *Forbes* and *Gregory*; and the eſtate of *Caldwell* and Co. is injured to the amount of the dividends paid by *Forbes* and *Gregory*.

Of the bills of *Caldwell* and Co. depoſited by the houſe of *Browne* as ſecurities for debts due by them the whole amount was proved againſt the eſtate of *Caldwell* and Co.: but the real balance owing by the houſe of *Browne* was proved againſt their eſtate, and the bills exhibited as ſecurities for thoſe debts only; and in one inſtance, as the dividend on the eſtate of *Caldwell* and Co. has paid the whole demand, the proof againſt the eſtate of *Browne*, if made, will be expunged. In which reſpect alſo the eſtate of *Caldwell* and Co. is injured.

All the bills, which the houſe of *Browne* received from *Caldwell* and Co. were diſcountable, and by far the greater amount thereof

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thereof were iſſued for the full value received by the houſe of *Browne*; and the eſtate of *Caldwell* and Co. had no value for the ſaid bills except the bad bills, received by them from the houſe of *Browne*; *viz.* the bills negotiated, and the bills not negotiated, but held over at the requeſt of the drawers.

The petition farther ſtated, that the petitioners had proved under the Commiſſion againſt the houſe of *Browne* the ſum of 139,482*l.* 10*s.* 6*d.*, which was then underſtood to be the caſh balance between the two eſtates, and claimed the ſum of 25,000*l.*, being then ſuppoſed as much as the eſtate of *Caldwell* and Co. would ultimately pay in dividends on the proof of bad bills againſt them more than the houſe of *Browne* would pay on their bad bills: but that on a more accurate ſtatement of the accounts they conceive, they are entitled to prove a much larger ſum than 25,000*l.*; as a balance to a greater amount than that ſum will ariſe on the dividends paid on the ſaid bills by the houſe of *Caldwell* and Co. and by the dividends paid by *Forbes* and *Gregory* out of the partnerſhip funds of *Caldwell* and Co. more than will be paid by the houſe of *Browne* on *Caldwell* and Co's bad bills. The bills received from the houſe of *Browne* by *Caldwell* and Co. and negotiated by them were the only conſideration they had for the bills drawn and iſſued by them to the houſe of *Browne*.

The petition farther ſtated, that ſince the above-mentioned proof the petitioners find the caſh balance to be upwards of 140,000*l.* (*a*) againſt the houſe of *Browne*: but that the dividend in reſpect thereof had been reſtrained; and the petitioners had only received a dividend on the ſum of 34,305*l.* 10*s.*, being the reſidue of the ſaid caſh balance after deducting the ſum of 105,694*l.* 10*s.*, being the amount of the bills drawn by the houſe of *Browne*, and proved againſt their eſtate by the aſſignees of *Forbes* and *Gregory*; which the commiſſioners had no right to deduct.

The prayer of the petition was, that the aſſignees of the houſe of *Browne* might be ordered to pay to the petitioners the dividend on the ſaid ſum of 105,694*l.* 10*s*, deducted from the proof for the caſh balance, with the intereſt accrued ſince the order of dividend,

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(*a*) See the correct ſtate of the accounts taken from the certificate, *ante*, facing p. 373.

vidend; and that the petitioners might be allowed to prove ſuch further ſum as ſhould be owing on the ſaid caſh account; and that an account might be taken between the eſtate of *George Browne* and *Henry Brown* and the eſtate of *Caldwell* and Co. of all dividends paid on the ſaid bad bills by *Caldwell* and Co. and by *Forbes* and *Gregory*, and of all the dividends paid on bad bills by the eſtate of *George Browne* and *Henry Brown*; and that in taking ſuch accounts the petitioners might have credit, not only for the dividends the eſtate of *Caldwell* and Co. had paid, but alſo for the dividends paid by *Forbes* and *Gregory* on the acceptance of ſuch bills; and that the petitioners might be at liberty to prove againſt the eſtate of *George Browne* and *Henry Brown* ſuch ſums as ſhould appear to be the balance of ſuch account; and that the petitioners might alſo be at liberty, beſides proving the balance on taking the ſaid account, to prove ſuch further ſum as ſhould ſeem proper, in order to give the utmoſt relief to the creditors on the eſtate of *Caldwell* and Co., that the circumſtances of the caſe would admit.

This petition having ſtood over ſeveral times on account of its intricacy came on to be heard upon the Certificate above ſtated.

Attorney General and Mr. Holliſt in ſupport of the petition.—It is extremely difficult to collect the effect of ſuch very complicated tranſactions. The juſtice of the caſe, if unprejudiced by deciſion, is, that in ſome way or other the claim ſhould be made againſt both eſtates; and that finally the eſtate damnified ſhould be relieved. In Lord *Thurlow*'s time it was matter of doubt, whether croſs paper could be proved. The firſt caſes were, where the party applying was a ſolvent perſon. I do not deny, that in ſuch a caſe the Court will require him to take up his bill before he receives a dividend; and I muſt therefore admit the caſe *Ex parte Brown* (*a*). But this difficulty occurs; that the perſon taking a ſecurity is in a worſe condition than if he did not take an indemnity. In *Touſſaint* v. *Martinnant*, 2 *Term Rep. B. R.* 100.

(*a*) *Ex parte Brown*, before Lord *Loughborough*, Chancellor, 23d *December* 1797.

In the caſe of a bond and a counter-bond the Lord Chancellor held, that no proof could be made upon the counter-bond, till the other bond was delivered up. See 1 *Cooke's Bankrupt Laws* 158, 159.

1 *Cooke's Bankrupt Laws* 146, it was held, that the bond of indemnity might have been proved under the Commiſſion. The ſame difficulty will ariſe, if the ſecurity is not a bond, but a counter-bill. It is ſaid, the party taking the counter-bill would have as good a remedy without it; and even further, that it puts him in a worſe condition; for he certainly would be entitled to ſtand in the place of the perſon he paid; and the certificate would not be a bar. The caſes decided, where there has been one ſolvent perſon, cannot rule, where there is no ſolvent perſon on either ſide. Some arrangement ſhould be made, if poſſible. It may happen, that the eſtate of the acceptor may pay 20*s.* in the pound; but not immediately. A caſe may occur, in which the acceptor may ultimately perform his engagement. In *Curtis* v. *Aſhton* ſo much difficulty occurred, that Lord *Thurlow* never decided it. The ſame difficulty was felt in the bankruptcy of *Liveſey.*

In this caſe *Caldwell* and Co. have paid and are likely to pay dividends on theſe bills to a much greater amount than the houſe of *Browne.* The claim is in reſpect of that exceſs.

Solicitor General, Mr. Cooke and Mr. Pemberton for the aſſignees of the houſe of Browne.—The object of this petition cannot be obtained conſiſtently with the rules, that prevail in bankruptcy.

In the bankruptcy of *Gibſon* and *Johnſon*, which was very much argued before Lord *Thurlow* in 1791, *Gibſon* and *Johnſon* had negotiated a number of bills, which were put into their hands by *Lovel.* Both parties became bankrupt: but the bankruptcy of *Gibſon* and *Johnſon* having happened near a year before the bankruptcy of *Lovel*, the conſequence was, that the bill-holders had received a dividend of 5*s.* 8*d.* in the pound out of the eſtate of *Gibſon* and *Johnſon*, before they could prove againſt the eſtate of *Lovel.* The diſtinction taken by the Commiſſioners was, that to the extent, in which the eſtate of *Lovel* was relieved, the aſſignees of *Gibſon* and *Johnſon* were entitled to take credit in the account. Lord *Thurlow* did not expreſsly declare his opinion; but intimated it ſo ſtrongly in favor of the Commiſſioners, that it was not brought on again; the aſſignees of *Gibſon* and *Johnſon* ſubmitting.

In the caſe of *M'Alpine* and Co., upon the eſtate of *Jefferies*, Lord *Thurlow* was of opinion, that the original debt revived in conſequence of the bills not being paid; and an order was made upon that principle: but that order was reverſed by the Lords Commiſſioners upon the ground, that, though the bills were not payment, unleſs they were good, yet they were payment, until they were returned to the drawers, the perſons who were the original debtors. The Lords Commiſſioners ſaid, they had converſed with all the Judges upon it.

One debt can be proved but once. It cannot be proved twice by any contrivance. The principle, upon which this claim is made, is a pretended equity, becauſe the eſtate of *Caldwell* and Co. is damaged to a greater extent then that of *Browne*. In the bankruptcy of *Lane* and *Frazer* it was conſidered perfectly clear, that there was no ſuch Equity. In *Ex parte Marſhall*, 1 *Atk.* 129, 131., in the bankruptcies of *Garway* and *Hatton*, no doubt the eſtate of *Hatton* was damaged: but that raiſed no demand. Third perſons in that caſe had a double proof; and Mr. *Yorke* in his opinion takes notice of that circumſtance: but as between the two eſtates it could be only an account of debtor and creditor; and the queſtion could be only, what was the debt at the time of the bankruptcy.

If the petitioners claim in reſpect of dividends paid, they claim in reſpect of a debt neceſſarily ſubſequent to the bankruptcy. A great deal of difficulty ariſes from not diſtinguiſhing between the rights of theſe three houſes. *Forbes* and *Gregory* muſt be conſidered as a diſtinct houſe. Suppoſe, *Caldwell* and Co. had continued ſolvent: they would have taken up the bills now in the hands of the aſſignees of *Forbes* and *Gregory*, and to that extent would have relieved the eſtate of *Browne*; and therefore would have been at liberty to prove in reſpect of that. Are they by the effect of their own bankruptcy to have a proof againſt the eſtate of *Browne*, which, if they had continued ſolvent, they could not have? If both parties had continued ſolvent, the bills iſſued by each houſe would have been paid by each reſpectively; and more would have been to be paid by the houſe of *Browne* than by *Caldwell* and Co. by about 140,000*l*. The effect of the bankruptcies is, that a proof in reſpect of that balance has been already made againſt the eſtate of *Browne*. As, in caſe the bills were paid on both

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Ex parte WALKER.

both ſides, that would be the only balance to be paid to *Caldwell* and Co., they cannot conſtitute themſelves in any ſhape creditors for a greater ſum. They might transfer the debt to another perſon: but they cannot by transferring increaſe it. So much of their debt as they transferred to *Forbes* and *Gregory* is gone. It cannot be claimed both by the original creditors and their tranſferrees.

In *M'Alpine's Caſe* and *Curtis* v. *Aſhton*, the diſtinction is acknowledged. In the caſe of a ſurety the proof can only be in proportion to what is actually paid to relieve the eſtate of the bankrupt. In *Touſſaint* v. *Martinnant*, Mr. Juſtice *Buller* certainly did not mean, that both bonds could have been proved under the Commiſſion.

The ſuppoſition of the poſſibility, that 20*s*. in the pound may be paid, does not alter the caſe. Your Lordſhip cannot balance between two eſtates; the one paying a large dividend, the other a ſmall one. As between bankrupt eſtates that makes no difference. The debt is equally diſcharged. If your Lordſhip were to conſider that ſort of Equity, you muſt go into all the accounts, and have before you all the different rights, that the failure in the payment of theſe bills on both ſides raiſes againſt both eſtates.

The claim is founded only upon the ground of greater damage ſuſtained by the eſtate of *Caldwell* and Co. A bankrupt cannot prove againſt another bankrupt's eſtate in any other condition than a ſolvent perſon. The aſſignees of *Forbes* and *Gregory* having already proved in reſpect of the bills remitted to them, the petitioners are only entitled to hold the proof for the ſum of 39,070*l*. 11*s*. 1*d*., the caſh balance.

Attorney General in reply.—The queſtion in this caſe ariſes on bills, which are a good debt at law. The petitioners have a quantity of bills in their hands, which are a legal debt capable of being proved; and it is a regulation in bankruptcy, that requires the croſs paper to be taken up. I admit the qualification, that finally we ſhould recoup to the eſtate of *Browne* the dividends they pay.

Touſſaint v. *Martinnant* illuſtrates this claim. The caſe *Ex parte Marſhall* was an attempt to prove one debt twice. I admit, that cannot be done: but this claim has not that effect: for it is not the ſame debt.

Lord Chancellor.—Are not both eſtates equally damnified? Take a creditor of one houſe, who is not connected with the other: he finds the eſtate, upon which he has a demand, damnified by what it pays towards the debts of the other. The amount of the damage may be different according to the different dividends.

When you take the bills into the account, muſt you not of neceſſity ſuppoſe all the bills to be good; and how can you by poſſibility augment the ſtate of the debt by the circumſtance, that both parties are become bankrupt? As between each other neither of them is at liberty to talk of the bills being bad. Suppoſe, they had both continued ſolvent, and had adjuſted their accounts, the ſum of 140,955*l.* 15*s.* 5*d.* would have been the exact balance to be paid. That ſum might have been diſcharged either by payment of the balance or a return of paper: but the actual debt between them can never exiſt upon any other footing than the ſuppoſition, that the bills are good. Till *Caldwell* and Co. pay all the creditors of *Browne*, who are likewiſe creditors of theirs, 20*s.* in the pound, they are by proving ſharing with the creditors of *Browne*, who are likewiſe creditors of theirs.

Bond of indemnity to a ſurety for payment of inſtalments, the firſt of which was not due till after the bankruptcy of the principal, cannot be proved, though payable before the bankruptcy.

In *Touſſaint* v. *Martinnant* the bond of indemnity could not be proved under the bankruptcy; for at the time of the bankruptcy there was no debt. The Court would not ſuffer execution to be taken out upon that judgment, when there was no debt due. The bond could only be taken to be a fraud upon the bankruptcy; and that is the uſe, that was made of it.

If I allow this petition, I muſt do two things, that are quite impoſſible. I muſt hold, that the bankruptcy creates a debt, which did not exiſt antecedently; and I muſt hold, that the ſame debt may be proved twice. Whatever happens after the bankruptcy is all chance. It might have happened, that the houſe of *Browne* had the better eſtate of the two.

The Order directed, that the proof ſhould ſtand for the ſum of 39,070*l.* 11*s.* 1*d.* only; which at the hearing was admitted to be the balance due on the caſh account.

1798.

WINCH *v.* JAMES.

Rolls.
Dec. 24th.

Upon a propoſal for a ſettlement under a commitment for marrying a ward of the Court a power was directed to be inſerted, enabling the wife to ſettle the intereſt of a moiety of her fortune upon any future huſband for life. The huſband on undertaking by his council to execute the ſettlement was diſcharged.

EDWARD MARTIN having married *Margaret James*, a ward of the Court, was committed to the *Fleet Priſon*. He preſented a petition, offering to make a ſettlement, and praying to be diſcharged; upon which it was referred to the Maſter to approve of a ſettlement. By the Accountant-General's certificate it appeared, that the fortune, to which Mrs. *Martin* was entitled, conſiſted of 12,032*l.* 13*s.* 2*d.* Three *per cent.* Bank Annuities and 351*l.* 8*s.* 11*d.* caſh; and by the ſettlement, approved by the Maſter's Report in conſequence of the petitioner's propoſal, the whole was ſettled to the ſeparate uſe of Mrs. *Martin* for life; with power, in caſe *Edward Martin* ſhould ſurvive her, to give him the intereſt of a moiety for his life: the principal to the children of the marriage according to the appointment of their mother; in default of appointment, equally; if but one, the whole to that one; and if there ſhould be no child, to the next of kin of Mrs. *Martin*; with power to Mr. and Mrs. *Martin* to ſettle a part upon the marriage of any child, and to Mrs. *Martin*, in caſe ſhe ſhould ſurvive her huſband, to ſettle a moiety upon her children by any other marriage.

Maſter of the Rolls.—There is an omiſſion in this ſettlement. It does not give the wife any power of ſettling any thing upon a future huſband; and, where a young woman is run away with, I will never conſent to tie her up to that marriage, and prevent her from ever marrying again.

The ſettlement is all right except in that particular. The whole is kept in her power entirely. Her huſband can have nothing but what ſhe chooſes to give him; which is perfectly right under theſe circumſtances (*a*).

Confirm the report, with this addition; that a power be inſerted therein enabling the ſaid *Margaret Martin* to ſettle the annual produce of a moiety of the truſt fund or any part thereof upon any after taken huſband for his life.

(*a*) See *Stevens* v. *Savage*, *ante*, vol. 1. 154.

Mr. W. Agar for the petitioner then deſired, that he might be diſcharged upon undertaking to execute the ſettlement.

Maſter of the Rolls.—I underſtand, that in *Stackpole's caſe* (*a*) the Lord Chancellor diſcharged him on undertaking to make a ſettlement.

Therefore upon the petitioner's undertaking by his counſel to execute the ſettlement, let him be diſcharged.

(*a*) *Ante*, vol. 3. 89.

WILLIAMS *v.* KINDER.

1798, *Dec.* 8th.
1799, *Jan.* 16th.

By the bankruptcy of the plaintiff pending an account the ſuit is abated.

Quære, Whether notwithſtanding the bankruptcy of the plaintiff at law the action may not proceed, the aſſignees giving ſecurity for the coſts?

BY the decree made in the cauſe it was referred to the Maſter to take certain accounts.

Before the accounts were gone through, the plaintiff took the benefit of the laſt Inſolvent Act; and aſſignees were appointed, to whom his eſtate and effects were aſſigned by the Clerk of the peace, in whom his property firſt veſted under the *Act*.

The aſſignees conceiving, the ſuit did not abate by the inſolvency of the plaintiff, took out warrants to proceed in the accounts before the Maſter; upon which a motion was made on the part of the defendant to ſtay proceedings, till a ſupplemental bill ſhould be filed by the aſſignees.

Mr. Cox in ſupport of the motion mentioned *Sellas* v. *Dawſon*, before Lord *Thurlow*, *December* 8th, 1790; which was conſidered, and overruled, by the Court of Exchequer in *Daviſon* v. *Butler*, 1 *Cooke's Bank. Law* 558.

LORD CHANCELLOR.—I had an idea, that at law, if the plaintiff becomes bankrupt, the aſſignees giving ſecurity for the coſts, the Court would allow the cauſe to go on. Lord *Thurlow* ſeems in the caſe cited to have taken it as clear, that the bankruptcy was an end of the ſuit at law: but I rather believe, the practice is, as I have ſtated. I am pretty ſure, there were ſome inſtances in the Court of Common Pleas upon motion for coſts upon judgment as in caſe of a nonſuit, or for not going to trial (that is the only courſe the defendant can take); and the aſſignees entering into ſecurity for the coſts, the cauſe went on in the name of the bankrupt. There is great convenience in letting the ſuit ſtand, if it can be done without injury to the defendants. All the expence of a new action is ſaved by the aſſignees taking up that action.

Let it be mentioned again.

1799. *Jan.* 16th.

Mr. Cox repeated his motion, and mentioned *Priddle* v. *Thomas*, *Hilary* Term 1768; in which the ſuit was permitted to go on, ſecurity being given for the coſts.

Mr. Pemberton for the aſſignees relied on the Caſe in the Exchequer.

Lord Chancellor.—The aſſignees muſt file a bill. There is no other way for them to come into this Court. If a plaintiff at law becomes bankrupt, the defendant can loſe nothing but his coſts. There can be no judgment againſt the plaintiff but for the coſts. In that caſe therefore, if there are farther proceedings, all, that is neceſſary, is to get ſecurity for the coſts. But in this Court more is neceſſary. A plaintiff in Equity may have a decree againſt him for an account, and to pay the balance. I muſt therefore have before me in a cauſe in Equity a ſubſtantive plaintiff, who may abide ſuch decree as may be made.

The proceedings in the Maſter's office muſt be ſtayed, till the aſſignees make themſelves parties to the cauſe.

WILLIAMS *v.* SORRELL.

Jan. 28th.

After an aſſignment of a mortgage payments to the mortgagee without notice muſt be allowed by the aſſignee: the regiſtry, the premiſes being in *Middleſex*, is not notice for this purpoſe. Tender after the bill filed of the balance, deducting the payments to the mortgagee, with coſts, deprived the aſſignee of ſubſequent coſts.

BY indenture dated the 10th of *April* 1792 *Benjamin Sorrell* mortgaged certain leaſehold premiſes in the county of *Middleſex* for the remainder of his term of ſixty years, to ſecure the ſum of 300 *l.* with intereſt to *Thomas Clifton*, ſubject to redemption upon payment of the principal and intereſt upon the 29th of *September* following; and the ſaid indenture contained a covenant by the mortgagor for payment of the mortgage-money and intereſt; and he gave a bond of the ſame date for the ſame.

Benjamin Clifton by indenture, dated the 16th of *January* 1794, in conſideration of 600 *l.* advanced to him by *Ann Williams* aſſigned the mortgage to *Ann Williams*, her executors, adminiſtrators, and aſſigns, ſubject to redemption on payment of 600 *l.* and intereſt on or before the 16th of *January* 1795; and as a farther ſecurity *Clifton* mortgaged other premiſes; and he gave a bond of the ſame date in the penalty of 1200 *l.*

The aſſignment of the mortgage was duly regiſtered.

Sorrell upon the 25th of *January* 1796 paid to *Clifton* 100 *l.* on account of the principal, and 14 *l.* 10 *s.* for intereſt, due on the mortgage: the receipts for which ſums expreſſed the former to be "in part of 300 *l.* ſecured by mortgage", and the latter to be "for "intereſt due at *Lady-day* next." Upon the 22d of *May* 1796, *Sorrell* paid to *Clifton* the farther ſum of 100 *l.* on account of the ſaid principal money; the receipt for which expreſſed that payment to be "in part of 200 *l.* due upon the mortgage".

Upon the 18th of *May* 1797 a Commiſſion of bankruptcy iſſued againſt *Clifton*, and he was duly declared a bankrupt.

In *July* 1797 the aſſignee of the mortgage filed the bill for a foreclosure; charging, that the regiſtry of the aſſignment was notice to the mortgagor.

Upon the 14th of *September* 1797 the money remaining due by the defendant for principal and intereſt, the payments made to

Cliſton being deducted, and the coſts up to that time, were tendered on the part of the defendant to the plaintiff, and refuſed.

The mortgagor by his anſwer denied any notice of the aſſignment until the 22d of *April* 1797; when he was applied to by the ſolicitor for the plaintiff for the whole 300 *l.* and intereſt; and he denied colluſion; and prayed coſts from the time of the tender.

LORD CHANCELLOR.—This is preciſely the queſtion, whether after an aſſignment of a mortgage payments made to the mortgagee without notice muſt not be allowed.

Solicitor-General for the plaintiff.—After the late caſe of *Matthews* v. *Wallwyn* (*a*) it is difficult to contend againſt that. The only difference in this caſe is, that this is a mortgage of premiſes in the county of *Middleſex*; ſo that there was a memorial regiſtered under the *Statute* (*b*); which is a ſpecies of notice, but, I am afraid, not for this purpoſe.

Mr. Piggott for the defendant.—The *Regiſtry Act* has nothing to do with this. A ſubſequent purchaſer or mortgagee is bound to look: but this caſe was not the object of the *Statute.* This mortgagor had no notice till above three years after the aſſignment. The aſſignee therefore put it in the power of the mortgagee to cheat the mortgagor. A mortgage is a ſecurity for a debt; as Your Lordſhip ſaid on the late occaſion.

LORD CHANCELLOR decreed, that the defendant, the mortgagor, ſhould be at liberty to redeem upon payment of what remained due, deducting the payments made to *Cliſton*, with coſts to the time of the tender only.

(*a*) *Ante* 118.   (*b*) 7 *Anne*, *c.* 20.

COUCH *v.* STRATTON.

Jan. 28th.

Settlement previous to marriage of the wife's fortune on herſelf, with a covenant by the huſband in conſideration of the marriage, *&c.*, and for making ſome proviſion for the wife and her iſſue, to pay within three months after his death 6000*l.* to the truſtees, in truſt, if the wife ſhould ſurvive him, and there ſhould be no iſſue, (which was the event) to pay 1500*l.* to the wife, her executors, *&c.*, and to pay the intereſt of the remaining 4500*l.* to her for life: ſhe is entitled to dower; and her ſhare under the *Statute of Diſtributions* is not a ſatisfaction or performance of the covenant.

By indenture, dated the 11th of *July* 1768, made previouſly to the marriage of *Hugh Stratton* and *Urſuliana Clarke*, two bonds and a promiſory note for different ſums, to the amount in the whole of 1000*l.*, the property of *Urſuliana Clarke*, were aſſigned to truſtees, upon truſt after the marriage to receive the intereſt of the ſaid ſeveral ſums of money ſecured by the ſaid ſecurities, and pay the ſame to *Urſuliana Clarke* for her ſeparate uſe during her coverture; and after the deceaſe of *Hugh Stratton*, in caſe *Urſuliana Clarke* ſhould ſurvive him, to aſſign the ſaid ſecurities and the money thereby ſecured to *Urſuliana Clarke*.

By another indenture of the ſame date, reciting the intended marriage, and that it was agreed, that the ſaid *Hugh Stratton* ſhould, beſides the portion ſecured to the ſaid *Urſuliana Clarke* by the ſaid indenture of equal date therewith, ſettle 6000*l.* upon the truſts thereinafter declared, *Hugh Stratton* in purſuance of the ſaid agreement, and in conſideration of the marriage, and the portion, he would receive, and for making ſome proviſion for the ſaid *Urſuliana* and her iſſue beſides the proviſion made by the ſaid indenture of equal date therewith, did for himſelf, his heirs, executors, and adminiſtrators, covenant and agree with the ſaid truſtees, their executors and adminiſtrators, that in caſe the ſaid marriage ſhould take effect, he, the ſaid *Hugh Stratton*, his heirs, executors and adminiſtrators, ſhould within three calendar months after his deceaſe pay to the ſaid truſtees or their executors or adminiſtrators the ſum of 6000*l.* with lawful intereſt from the day of his death, upon truſt, in caſe the ſaid *Urſuliana Clarke* ſhould ſurvive him, having no iſſue living by him at his death, nor being then *enſient* with ſuch iſſue, which ſhould be born alive, that the ſaid truſtees ſhould pay 1500*l.* and the intereſt thereof, part of the ſaid 6000*l.* and intereſt, to the ſaid *Urſuliana Clarke*, her executors, adminiſtrators and aſſigns, for her and their own uſe; and concerning 4500*l.* and the intereſt thereof, the remainder of the ſaid 6000*l.* and it's intereſt, upon truſt to place the ſame out at intereſt, and pay the intereſt thereof to the ſaid *Urſuliana*, as long as ſhe ſhould live; and after her deceaſe to aſſign the ſaid 4500*l.* to ſuch perſons and in ſuch manner as *Hugh Stratton* ſhould by deed or will appoint, and for want thereof to pay the ſaid 4500*l.* to the executors and adminiſtrators of *Hugh Stratton.*

Settlement previous to marriage of the wife's fortune on herſelf, with a covenant by the huſband in conſideration of the marriage, &c., and for making ſome proviſion for the wife and her iſſue, to pay within three months after his death 6000*l.* to the truſtees, in truſt, if the wife ſhould ſurvive him, and there ſhould be no iſſue, (which was the event) to pay 1500*l.* to the wife, her executors, &c., and to pay the intereſt of the remaining 4500*l.* to her for life; ſhe is entitled to dower; and her ſhare under the *Statute of Diſtributions* is not a ſatisfaction or performance of the covenant.

The ſettlement contained other clauſes diſpoſing of the ſaid 6000*l.* upon other contingencies, which did not happen.

The marriage took place ſoon afterwards. *Hugh Stratton* died in *March* 1795 inteſtate, ſeiſed of real eſtate and poſſeſſed of leaſehold and perſonal eſtate, without leaving any iſſue, and without leaving his wife *Urſuliana enſient.* She took out letters of adminiſtration.

The bill was filed by the next of kin and coheireſſes at law of *Hugh Stratton* againſt his widow; praying, that an account may be taken of the perſonal eſtate; and that it may be declared, that the defendant is by the ſaid ſeveral indentures of the 11th of *July* 1768 barred of dower and of any ſhare of the perſonal eſtate under the *Statute of Diſtributions*; or, if the Court ſhall be of opinion ſhe is not ſo barred, then that it may be declared, that the ſum of 1500*l.*, part of the ſaid ſum of 6000*l.*, which the defendant took under the ſettlement abſolutely, and the life intereſt, which ſhe took in the ſum of 4500*l.*, reſidue of the ſum of 6000*l.* therein mentioned, ought to have been received and taken by her in part ſatisfaction of ſuch ſhare of the perſonal eſtate of the inteſtate under the *Statute;* and that the defendant may deliver up the title-deeds, &c, relating to the real eſtate.

Solicitor-General and Mr. Romilly for the plaintiffs.—Upon the firſt queſtion the plaintiffs contend, that it is to be inferred from the terms of this ſettlement, that the fund ſecured by it was to be the only proviſion for the wife in caſe of her ſurviving her huſband: *Vizard* v. *Longdale*, mentioned in *Tinney* v. *Tinney*, 3 *Atk.* 8; alſo cited in *Jordan* v. *Savage*, *Bac. Ab.* tit. *Jointure B.* 717. (new edition); alſo mentioned in *Lord Annaly's Reports.*

Upon the ſecond queſtion, ſuppoſing the defendant not barred by the ſettlement, her ſhare of the perſonal eſtate under the *Statute*, which is much more than the proviſion under the covenant, muſt be a ſatisfaction, or rather, according to ſome of the caſes, a performance, of what her huſband intended to do. *Blandy* v. *Widmore*, 1 *P. Will.* 324, 2 *Vern.* 709, which appears by Mr. *Cox*'s note to have been twice affirmed, has been acted upon in *Lee* v. *D'Aranda*, 1 *Veſ.* 1. 3 *Atk.* 419, and a variety of caſes ſince. It is impoſſible to diſtinguiſh this caſe from thoſe. It cannot be diſtinguiſhed from *Blandy* v. *Widmore* merely upon the circumſtance, that the ſum of 1500 *l.*, to which the defendant is entitled under the covenant, forms part of the ſum of 6000 *l.*; nor from *Lee* v. *D'Aranda*, becauſe it is to be paid, not directly to her, but to truſtees, in truſt to pay over to her. The diſtinction, that has been taken, is, where the proviſion has been leſs advantageous; as, if it is to be paid at a diſtant time, *&c.* There have been many caſes of real eſtate of the ſame deſcription; that where a man covenants, that upon his death his wife ſhall take a certain ſum out of his property, if he dies inteſtate, and his widow under the *Statute of Diſtributions* takes a ſum equal to that in the covenant, it is a ſatisfaction of the covenant.

Attorney-General and Mr. Steele for the defendant.—The way, in which the firſt queſtion has been ſtated, decides it; that the intention is to be collected from the deed. That is the rule in all caſes upon wills ſince *Lawrence* v. *Lawrence* (*a*). The Court has expected either an expreſs intention or neceſſary implication. This deed affords neither. It does not appear, whether the huſband had any land at the date of the deed. Probably he had not.

As to the other point, none of theſe caſes are authorities for declaring, that an allowance is to be made in the diſtribution of the perſonal eſtate for this ſum of 1500 *l.*; and it muſt be carried farther; for if ſo, it follows of neceſſity, that the value of the life intereſt in the ſum of 4500 *l.* muſt alſo be allowed. The caſes cited ſtand very much by themſelves; and the Court has been in the habit of conſidering them conſtantly as caſes of ſtrict performance; and if it cannot be ſaid, that a covenant is ſtrictly performed, it has never been taken as a ſatisfaction (*b*). Lord *Hardwicke* in *Barret* v. *Beckford*, 1 *Veſ.* 519, conſiders thoſe caſes in that way. Therefore from the circumſtances of thoſe caſes and the comments made upon them they are to be conſidered as caſes, in which the covenant was actually performed in the terms of it, or at leaſt in the terms of the agreement, which produced it; for a

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(*a*) See *French* v. *Davies*, and *Strahan* v. *Sutton*, *ante*, vol. 2. 572; vol. 3. 249.

(*b*) See Mr. *Cox*'s note to *Blandy* v. *Widmore*, 1 *P. Will.* 324.

covenant to leave is performed either by leaving expreſsly, or by operation of law, no diſpoſition being made. Lord *Thurlow* in *Kirkman* v. *Kirkman*, 2 *Bro. C. C.* 95, ſeems not to approve of thoſe deciſions; ſaying, he ſhould have thought, the word "*leave*" ſhould be taken in an active ſenſe.

There is no pretence to ſay, this covenant is performed. The intention cannot be doubted. There is nothing to ſhew, the huſband did not mean, his wife ſhould have any thing more. The expreſſion in the deed is "*for making ſome proviſion*" for his wife and iſſue. The inference from that is, that he might then intend to make a farther diſpoſition for them by his will according to his circumſtances. It can hardly be doubted, that he knew, he was under this covenant; and with that knowledge he thought, the law would make a proper will for him, ſatiſfying that among his other debts. This fund of 1500 *l.* is blended with the proviſion, which relates to the 4500 *l.* It could not be the intention, that a part of the ſum ſecured by the whole effect of the entire covenant ſhould be taken as a ſatiſfaction, and the intereſt of the other part ſhould not go likewiſe in diſcharge of the diſtributive ſhare. If it is to turn upon the ſuppoſed intention, the ſame evidence, that ſhews the intention, that the 1500 *l.* is to go, as it were, into hotchpot, muſt likewiſe make out, that the value of the life intereſt muſt be brought into hotchpot in the ſame manner.

Solicitor-General in reply.—In *Lee* v. *D'Aranda* it was to be done by deed or will. A fair argument ariſes from that, that the word "*leave*" was, as Lord *Thurlow* ſays, uſed in an active ſenſe.

Lord Chancellor.—You do not go ſo far as to contend, that the intereſt of the 4500 *l.* is to be taken as a ſatiſfaction.

Solicitor-General.—No. It is merely an annuity for life.

Lord Chancellor.—Then the covenant is entire.

With regard to the other point here is nothing carrying with it the leaſt implication with reſpect to dower.

Vizard v. *Longdale* does not, I believe, ſtand high in point of authority. Not a great while before that caſe *Lawrence* v. *Lawrence*

rence (a) occurred; which was ſo much conteſted; running upon the point, whether this Court could hold any thing a bar, which is not a bar by the *Statute* (b).

Solicitor-General.—In *Vizard* v. *Longdale*, I believe, the queſtion moſt diſcuſſed was, not ſimply upon the conſtruction of the inſtrument, but whether that ſort of proviſion by a bond to ſecure a ſum of money could from the nature of the ſecurity be conſidered as a bar of dower. There is ſtrong reaſon to think ſo from what is ſaid upon it in *Atkins*.

The common decree was made for an account of the perſonal eſtate, &c.

ſee 10. Ves. Jun. 7. in the case of Garshore v. Chalie.

(a) 1 *Eq. Ca. Ab.* 218, 219. 2 *Vern.* 365. 1 *Bro. P. C.* 591. (b) 27 *Hen.* 8. *c.* 10.

1799.
Jan. 29th.

In the COURT of EXCHEQUER.

The Rt. Hon. Sir ARCHIBALD MACDONALD Knt., Chief Baron.
Sir BEAUMONT HOTHAM Knt.
Sir RICHARD PERRYN Knt. } Barons.
Sir ALEXANDER THOMPSON Knt.

FIELD *v.* ———.

A ſeparate creditor of a partner has no right againſt the joint property farther than the ſeparate intereſt of that partner; *viz.* his ſhare upon a diviſion of the ſurplus, ſubject to the accounts of the partnerſhip: therefore joint property of an inſolvent partnerſhip taken in execution for a ſeparate debt cannot be held againſt the joint creditors.

THE point in this cauſe depended upon the general queſtion, whether a ſeparate creditor of one partner can hold the partnerſhip effects, taken under an execution for his ſeparate debt, againſt the joint creditors of the partnerſhip.

At the time the execution took place the partnerſhip was inſolvent; but a commiſſion of bankruptcy had not then iſſued.

The Court having taken ſome time to conſider, the *Lord Chief Baron* delivered their opinion:

The right of the ſeparate creditor under the execution depends upon the intereſt, each partner has in the joint property. With reſpect to that we are of opinion, that the *Corpus* of the partnerſhip effects is joint property; and neither partner ſeparately has any thing in that *Corpus;* but the intereſt of each is only his ſhare of what remains, after the partnerſhip accounts are taken.

In *Skipp* v. *Harwood* (*a*), we ſee, that whatever the right of the partnerſhip may be, it is not affected by what may happen between the individual partners. There is a diſtinction between the rights of the partners and the rights of the partnerſhip. As between one partner and the ſeparate creditors of the other they cannot affect the joint ſtock any farther than that partner, whoſe creditors they are, could have effected it. In *Fox* v. *Hanbury Cowp.* 445, Lord *Manſfield* was led to the conſideration of a point, that bears much upon this caſe; and adverting to the caſe of *Skipp* v. *Harwood* he ſtates a paſſage of Lord *Hardwicke*'s judgment from his own note rather ſtronger than it appears in the Report: “If a creditor of one “ partner takes out execution againſt the partnerſhip effects, he can

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(*a*) 1 *Veſ.* 239. by the name of *Weſt* v. *Skip*.

"only have the undivided ſhare of his debtor; and muſt take it "in the ſame manner the debtor himſelf had it, and ſubject to the "rights of the other partner."

What is the manner, in which the debtor himſelf had it? He had that, which was undivided, and could only be divided by firſt delivering the effects from the partnerſhip debts. He who comes in as his companion, as joint-tenant with him, according to this doctrine of Lord *Hardwicke* muſt take it in the ſame manner the debtor himſelf had it, ſubject to the rights of the other partners.

Lord *Mansfield* having ſtated what according to the courſe of the Common Law, as far as it reſpects trade between partners, is the rule, that a creditor taking out execution againſt a partner is directly in the place of the partner debtor, proceeds to ſhew, that by the ſame rule, where a partner becomes bankrupt, the aſſignees are put in the place of the partner, in whoſe right they come in, and by no means, as was argued by Mr. *Plumer*, by any rule ariſing out of the Bankrupt laws; for nothing is ſaid in any one of thoſe *Acts* as to the creditors of a partnerſhip and the ſeparate creditors of one partner: but they only provide for the caſe of mutual debts, and accelerating a debt upon a ſecurity payable at a future day. But the ſame Common Law applied in the caſe, where one partner becomes a bankrupt, provides, that the aſſignee of the bankrupt ſhall be in the ſame ſituation as that, in which a creditor taking out execution ſtood before thoſe *Acts*. This introduces all the caſes of bankruptcy; which Mr. *Plumer* wiſhed to exclude, as not applicable to a caſe, in which there was no bankruptcy; and this caſe is to be conſidered, as if no bankruptcy had taken place; as the execution was before the bankruptcy. In law there are three relations: firſt, if a perſon chooſes for valuable conſideration to ſell his intereſt in the partnerſhip trade; for it comes to that; or if his next of kin or executors take it upon his death; or if a creditor takes it in execution, or the aſſignees under a Commiſſion of bankruptcy. The mode makes no difference: but in all thoſe caſes the application takes place of the rule, that the party coming in the right of the partner comes into nothing more than an intereſt in the partnerſhip, which cannot be tangible, cannot be made available, or be de-

Aſſignee, executor, or ſeparate creditor, coming in the right of one partner againſt the joint property comes into nothing more than an intereſt, ſubject to an account between the partnerſhip and the partner, and therefore to the joint debts: aſſignee under a ſeparate Commiſſion of bankruptcy has only the ſame right to ſtand in the place of the bankrupt by the Common Law, not under the Bankrupt laws.

livered, but under an account between the partnerſhip and the partner; and it is an *item* in the account, that enough muſt be left for the partnerſhip debts.

A great deal has been ſaid of the inconvenience. What is the inconvenience? It is true, the individual truſted to the partnerſhip fund in his idea at the time he was lending the money: not that I believe, that is very common. But it may be dangerous in a thouſand inſtances to have any thing to do with a trader; as, for inſtance, to purchaſe an eſtate; for an act of bankruptcy may have been committed five years before, which will reach the eſtate. But look to the danger on the other ſide: one partner giving a bond; and the creditors of the partnerſhip looking to the ſtock itſelf. It is ſaid, that in this caſe the joint creditors had done nothing; and this meritorious creditor has a right to be preferred on account of his early diligence. But what is that, to which he is entitled? The eſtate of a partner is debtor to him. The queſtion therefore recurs to the conſideration, what it was that partner had; for the creditor cannot be entitled to any more. It therefore argues nothing to ſay, he has the merit of diligence, till we ſee, upon what that merit can attach. If the partner himſelf therefore had nothing more than an intereſt in the ſurplus beyond the debts of the partnerſhip upon a diviſion, if it turns out, that at Common Law that is the whole, that can be delivered to, or taken by, the aſſignee of a partner, the executor, the ſheriff, or the aſſignee under a Commiſſion of bankruptcy, all, that is delivered to the creditor taking out the execution, is the intereſt of the partner in the condition and ſtate he had it; and nothing was due to this partner ſeparately, the partnerſhip being inſolvent. The whole property was due to the partnerſhip creditors, and not to either partner.

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BOOTH *v.* BOOTH.

Rolls.
1798,
Dec. 21, 24.
1799,
Jan. 29.

Reſiduary bequeſt to truſtees upon truſt to pay the dividends, &c, equally between the teſtator's two great-nieces until their reſpective marriages, and from and immediately after their reſpective marriages to aſſign and transfer their reſpective moieties or ſhares thereof unto them reſpectively, held a veſted intereſt before marriage; being taken out of the general rule from the Civil Law, that *dies incertus in teſtamento conditionem facit?* One of the legatees being dead without having been married, the Court directed one moiety to be paid to her executors; but would not permit the other moiety to be paid, but directed the intereſt and dividends of that moiety to be paid to the other legatee, with liberty to apply in caſe of her marriage or her death before marriage.

ROBERT BRAGGE by his will, dated the 21ſt of *January* 1777, deviſed his real eſtate to his great-nephew *Robert Booth* and his iſſue in ſtrict ſettlement, with remainder to his brother *Richard Booth* and his iſſue in ſtrict ſettlement; with ſimilar remainders to their ſiſters *Phœbe Booth* and *Ann Booth*, and their iſſue reſpectively.

The teſtator alſo gave a legacy of 600*l.* to his great-nephew *Robert Booth*, and 100*l.* to *Robert Lathropp*, whom he appointed ſole executor; and, after giving ſome other pecuniary legacies, he gave all the reſidue of his eſtate and effects, which ſhould remain after paying his debts, funeral expences, charges of proving his will, and the legacies, to Sir *John Chapman* and *Robert Lathropp*, their executors, adminiſtrators, and aſſigns, upon truſt as ſoon after his deceaſe as conveniently might be to collect and get in ſame, and inveſt ſame from time to time in ſome of the public funds or upon Government or real ſecurity in their joint names or in the name of ſurvivor with power to change ſuch funds; and upon truſt to pay the dividends and produce thereof, as the ſame ſhould from time to time become due, equally between his great-nieces *Phœbe Booth* and *Ann Booth* until their reſpective marriages, and from and immediately after their reſpective marriages to aſſign and transfer their reſpective moieties or ſhares thereof unto them reſpectively.

The teſtator died ſoon afterwards. *Richard Booth* took a conſiderable real eſtate upon the death of his father.

At the date of the will *Phœbe Booth* and *Ann Booth* were both of age; and they filed the bill to have their intereſts in the reſidue declared: but the Maſter of the Rolls thought, that, as the plaintiffs might marry, the queſtion was not ripe for deciſion.

By the decree made in that cauſe on the 13th of *June* 1793 the fund was ordered to be transferred to the Accountant-General; and an inquiry was directed for the purpoſe of aſcertaining, who were the teſtator's next of kin at the time of his death.

The Report ſtated, that the plaintiffs and their two brothers *Robert* and *Richard Booth* were the teſtator's next of kin at the time

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of his death; and that the plaintiff *Phœbe Booth* died in *June* 1797, without having been ever married. By her will, made ſhortly before her death, ſhe appointed her brother, the defendant *Richard Booth*, and the plaintiff *Ann Booth*, her executors; and having diſpoſed of certain real eſtates, and given a legacy of 100*l.* to her brother *Richard Booth* for his trouble as one of her executors, ſhe gave the reſidue of her perſonal eſtate to the plaintiff *Ann Booth*, but with ſuch requeſt annexed, as therein mentioned.

The cauſe coming on for farther directions, the queſtion was, whether the ſhare of *Phœbe Booth* in the reſidue of the perſonal eſtate of *Robert Bragge* under his will was an abſolute veſted intereſt in her, to be transferred to her executors, or whether in the event of her having died unmarried it belonged to the next of kin of *Robert Bragge* as undiſpoſed of.

Mr. Lloyd and Mr. Wooddeſon for the plaintiff.—This was clearly a veſted intereſt in *Phœbe Booth*, though ſhe never married, according to *May* v. *Wood*, 3 *Bro. C. C.* 471, and other caſes: marriage not being a condition precedent. The words "*until*" and "*when*" denote the time of payment; and poſtpone that only; not importing a condition precedent to the veſting of the intereſt. This is a perſonal legacy. There is ſcarce an inſtance, in which the dividends having been given, and the capital being directed to be paid to the ſame perſon at a future period, it has been held a condition precedent. In *Daintry* v. *Daintry*, 6 *Term Rep. B. R.* 307, which was ſent from this Court, nothing but the annuity was given to the deviſee, until he married; yet the Court of King's Bench held, he had the abſolute property. From *Boraſton's Caſe*, 3 *Co.* 19, down to *Doe* v. *Lea*, 3 *Term Rep. B. R.* 41. the deciſions have been uniform, that, as a general propoſition, the word "*until*" does not prevent the veſting. In *Atkinſon* v. *Paice*, 1 *Bro. C. C.* 91. the Lord Chancellor relied on *Tomkins* v. *Tomkins*; though it does not appear in the Report; and that caſe was alſo relied on by Lord *Mansfield* in *Goodtitle* v. *Whitby*, 3 *Bur.* 234.

It will be contended, that there is a diſtinction between an event, that is certain, and muſt come, and ſuch an event as marriage; and there are ſeveral caſes, that may at firſt ſight appear in favor of the defendant; as *Garbut* v. *Hilton*, and *Atkins* v. *Hiccocks*, 1 *Atk.* 381;

381; 500; and *Elton* v. *Elton*, 3 *Atk.* 504. 1 *Veſ.* 4. 1 *Wilſ.* 159: but there are ſtriking diſtinctions. Thoſe were all gifts of a legacy, not a reſidue, and upon the condition of marriage requiring conſent. Therefore the legacies were held not due; and the rule of the Civil Law, that *dies incertus in teſtamento conditionem facit*, took place. Where the teſtator affects to diſpoſe of the reſidue, there is always a ſtrong preſumption againſt preſuming an inteſtacy. In all thoſe caſes there are expreſs words of condition: in this there are none. In *Atkins* v. *Hiccocks* Lord *Hardwicke* ſtates the rule of the Civil Law; and cites a paſſage from *Swinburne*. There is another paſſage in the ſame book, 298. *folio edition*, which is very ſtrong; where the caſe is put of a ſum of money given to a young maid for and towards her marriage; and ſhe dies unmarried: Upon the queſtion, whether it is due to her executor, *Swinburne* gives his opinion, that it is due; eſpecially if ſhe was marriageable; and he cites many authorities. *Ward* v. *Trigg*, cited in *Elton* v. *Elton*, 3 *Atk.* 505. 1 *Veſ.* 5. is a ſtrong authority, that it is not true as a general propoſition, that in all ſuch caſes an actual marriage is neceſſary.

In this caſe the produce of the whole reſidue is given to theſe great-nieces immediately after the teſtator's deceaſe until their reſpective marriages; and in giving the capital he deſcribes it as their reſpective moieties or ſhares thereof.

Mr. Graham for the defendants, the other next of kin.—Upon the words of this will and the authories it is impoſſible to contend, that there is a neceſſary implication, that the teſtator intended the capital of his reſiduary perſonal eſtate to veſt at all events in his great-nieces. The words clearly expreſs in plain language a different idea. The dividends only are to be paid, until they marry; and then from and immediately after their reſpective marriages, without any ſeparation of the ſentence, the capital is to be aſſigned and transferred in moieties. He has expreſsly negatived the veſting till marriage; therefore if they lived to the age of ninety unmarried, it is impoſſible, they could have had more than the dividends. The intention not to give them the capital, unleſs they marry, may be very conſiſtent. He might have thought, they would not want the capital, unleſs they married; therefore ſuppoſing, they would marry, he did not look to the particular caſe, that has happened. It is an argument frequently uſed upon wills, that if the caſe had been put to the teſtator, he would have provided for it. The anſwer to that is, *Quod voluit non dixit.* I admit the caſes, in which it has been held, that, where the capital is given originally in truſt to receive and diſpoſe of the rents and profits for the maintenance and education of an infant, until he ſhall attain 21, and, when he ſhall attain that age, to aſſign the ſame to him, the capital being given in the firſt inſtance evidently for the benefit of the party, and the payment only poſtponed, his not arriving at that time ſhall not defeat the veſting. In *May* v. *Wood* the abſolute intereſt was given in the firſt inſtance. In *Mackell* v. *Winter* (*ante*, vol. 3. 536) the Lord Chancellor went merely upon this; that nothing was given, till the event happened. In *Batsford* v. *Kebbell* (*ante*, vol. 3. 363.) His Lordſhip clearly affirmed that opinion; holding, that where the dividends are given, until a particular time arrives, or a particular circumſtance happens, if the party does not arrive at that time, or that circumſtance does not happen, the diſpoſition of the capital does not take effect. The Courts of Law have found themſelves bound, where the teſtator has marked the circumſtance, upon which the property is to go over. In *Doo* v. *Brabant*, and *Calthorpe* v. *Gough*, 3 *Bro. C. C.* 393, 395. the argument from the general intention was much ſtronger than in this inſtance.

The paſſage in *Swinburne* is ſimply an opinion of his own. The current of caſes cited by him is with the defendant; and the reaſon is given; "*particularly if ſhe was marriageable.*" A legacy given in that way may be conſidered as given abſolutely to her for her advancement in life. This teſtator ſhews a different intention in the event of theſe legatees marrying, or not. A clear expreſs intention appears, that they ſhall take the capital only in the event of their being married; and there is no neceſſary inference; for there is a very probable reaſon the other way; that being unmarried they would only require the dividends. The reaſoning in the caſes in *Atkins* is very ſtrong in favor of the defendants. *Ward* v. *Trigg*, if there were not other circumſtances, would be againſt theſe caſes: but the teſtator meant, that legacy ſhould not fall into the reſidue in any other event than that ſpecified; and the Court then adopted the principle, that it was merely intended as check upon a marriage without conſent; and therefore as the daughter did not marry, there was no ground of forfeiture. In the other caſes Lord *Hardwicke* clearly thought, marriage was an eſſential part of the character of the legatee.

That applies equally to a reſidue. What difference is there between a legacy and a ſhare of the reſidue? Every legacy is a ſhare of the reſidue.

1799.

Booth v. Booth.

Maſter of the Rolls.—There is a great diſtinction between a legacy and a bequeſt of a ſhare of the reſidue given in this way. Where a legacy is given upon a condition, if the reſidue is diſpoſed of, the legacy is given, though the condition is not performed. In this caſe the Court ſtruggles againſt an inteſtacy. The Court is always liberal, wherever it can be contended, that payment merely is poſtponed on account of the age of the party or other circumſtances.

In *Mackell* v. *Winter* the Lord Chancellor in reverſing my decree went upon there being nothing veſted. I thought, I found ſuch words; and I think ſo ſtill.

The material difference between this caſe and *May* v. *Wood* is, that the time of marriage may never arrive. Lord *Hardwicke* laid great ſtreſs upon that difference; for marriage is to be ſuppoſed the conſideration, upon which the legacy is to attach.

Daintry v. *Daintry* was a very particular caſe, turning upon the whole will. Lord *Kenyon* did not approve of the diſtinction in *Forth* v. *Chapman*, any more than I do: but it cannot be got rid of. I know, the Judges were inclined to make another Certificate, and to certify as to the real eſtate, one way, as to the perſonal, another: but they found the will too ſtrong.

In *Doo* v. *Brabant* Lord *Thurlow* inclined the other way: ſo did I in *Calthorpe* v *Gough*.

Mr. Lloyd in reply.—In *Mackell* v. *Winter* the Lord Chancellor went upon the violent implication ariſing upon the whole will; and your Honor determined *Wainewright* v. *Wainewright* (*ante*, vol. 3. 558) upon the ſame ground.

Theſe conditions are conſidered ſubſequent. There is a ſenſible diſtinction between a legacy and a reſidue. It is clear, this man could not mean to die inteſtate, in caſe theſe legatees did not marry. It is not given over; and he has given a legacy to his executor, ſo as to make him a truſtee. In thoſe caſes in *Atkins*, if the legatee did not marry, the legacy was given to other perſons by name. This is a very peculiar caſe. Suppoſe, theſe great-nieces were the only next of kin, it would be very abſurd to ſuppoſe, that he meant in the event of their not marrying to give it to any one elſe. He muſt have known, that in that event they would take one half of it.

Some caſes have been determined, that have rendered this ſubject rather nice. In *Barlow* v. *Grant*, 1 *Vern*. 255. a legacy to put an infant out apprentice was held veſted, though the legatee died without having been put out (*a*). It might have been there ſaid, it was for a particular purpoſe. If according to the rule laid down by the Lord Chancellor in *Batsford* v. *Kebbell* there is to be a diſtinction between the rents and profits and the land itſelf, and between the dividends and the capital, that will go a great way towards overturning *Daw* v. *Lord Chatham* (*b*) and other caſes, in which it has been held, that a gift of the rents and profits or dividends is a gift of the land or the fund itſelf. Upon the diſtinction between a legacy and a reſidue this is veſted. There is no confinement to the lives of theſe legatees; and the expreſſion "*their* "*reſpective moieties*" is very ſtrong.

Dec. 24th.

Maſter of the Rolls.—I have looked into all the caſes, that were cited, and ſome others, that occurred to me, upon the queſtion, whether theſe ſhares of the reſidue were veſted, or not; and I am much inclined to think, they were veſted; notwithſtanding the general rule, that an uncertain day of payment, or any circumſtances, that are to precede the payment of a legacy, will render it ſubject to condition. That is the general rule; and I ſhould be very ſorry to be ſuppoſed by any judgment of mine to break in upon it. The only queſtion is, whether upon the circumſtance, that this is the caſe of a reſidue, and the particular wording of the clauſe, this caſe is made an exception to the rule, and is taken out of it. At preſent I am very much inclined to think, it is: but I am not prepared to make that decree, leaſt I ſhould be thought to break in upon the rule.

(*a*) See alſo *Nevill* v. *Nevill*, 2 *Vern*. 431.

(*b*) 6 *Bro. P. C.* 450; *Fearne's Executory Deviſes* (edition by *Powell*) 169, &c.

In *May* v. *Wood* the caſe of *Love* v. *L'Eſtrange*, 3 *Bro. P. C.* 337, is mentioned; my obſervations upon which are repreſented with too great latitude. I alſo doubt, whether Lord *Loughborough*'s obſervations upon that caſe in *Monkhouſe* v. *Holme* are correctly ſtated. If it is accurate, it is a ſtrong authority, that the caſe of a reſidue is a complete exception to the rule. It is true, the caſe of a reſidue does not appear in the reaſons in *Love* v. *L'Eſtrange* to have been much inſiſted on.

My inclination is to hold this a veſted intereſt: but I wiſh to take more time to conſider it.

1799. *Jan.* 26th.

Maſter of the Rolls.—This caſe deſerved very great conſideration, leaſt it ſhould be ſuppoſed, that the Court had by deciding it tranſgreſſed the rule laid down as to legacies given payable at an uncertain time. When it was argued, I was impreſſed with an idea, that it was diſtinguiſhable from all the caſes in reſpect of its being not the caſe of a legacy, but a reſidue; and all the caſes, in which that rule prevailed, were caſes of mere legacies, to be paid out of the perſonal eſtate by the executor; the reſiduary legatee, or the executor, if he was to have the reſidue, having only to pay at the time the legacy became due, and taking the reſidue. But this is not that caſe, but the caſe of a reſidue.

I do not ſee, that any of the pecuniary legacies are given to *Phœbe* and *Ann Booth;* though I do not think, that would make much difference: they are both comprehended in the limitations of the real eſtate. It is to be obſerved, that *Robert Lathropp* only is executor: Sir *John Chapman* is a truſtee, but not executor. Therefore it is not a gift of the reſidue to the executor, but to him and another perſon, upon theſe truſts. Both theſe reſiduary legatees were adults at the time the reſidue was given to them: if it had been otherwiſe, it might have made ſome ingredient in the argument. The event, that has happened, is that one of them has died without having ever been married; and the bill (*a*) is filed by her ſiſter claiming under her will, and inſiſting, that ſhe was entitled, though ſhe never married; that marriage was not a condition precedent, upon which the reſidue was to veſt; but merely denoted the time, at which the reſiduary legatees were to be put in full poſſeſſion of the property.

(*a*) A ſupplemental bill was filed after the Report in the original cauſe.

The argument upon the part of the plaintiff turned upon a ground, that is frequently taken upon legacies payable at a future day, which on account of the death of the legatee never arrives; that the time being mentioned merely as the time of payment on account of the ſituation and circumſtances of the party is never held to defeat the legacy. The caſes were commented upon on both ſides. *Atkinſon* v. *Paice* was mentioned; which I lay out of the caſe. It does not prove much. Of the other caſes *Boraſton's caſe*, *Doe* v. *Lea*, *Goodtitle* v. *Whitby*, and *Mansfield* v. *Dugard*, 1 *Eq. Ca. Ab.* 195, are in favor of the plaintiff: but it was properly obſerved, they were all caſes of an abſolute intereſt; the poſſeſſion of which was to be given at a certain time. The reaſoning upon them would be ſufficient for the plaintiff, if applied to this caſe; for the reaſoning is, that, though the teſtator has given a partial intereſt till that time, thoſe words of reference as to the time are not to be conſidered as referring to the time, upon which only the deviſe is to take place, but the time, at which the deviſee or legatee is to be entitled to the full and abſolute benefit of the bequeſt; and a reaſon is given, which does not apply to this caſe, that it cannot be ſuppoſed, that, if the deviſee or legatee ſhould die before that time, leaving children, the intention was, that the children ſhould not take. I ſhall not comment upon the caſes. The arguments of the Judges, who decided them, are very full to ſhew, that ſuch words do not make a condition precedent, but merely denote the time of abſolute poſſeſſion.

It is very true, the caſes relied on by the defendant, *Garbut* v. *Hilton*, *Atkins* v. *Hiccocks*, and *Elton* v. *Elton*, are very diſtinguiſhable from this. Firſt, they are all caſes of mere legacy, not of a reſidue: Secondly, in the very gift of the legacy it is perfectly clear, as Lord *Hardwicke* obſerves in *Elton* v. *Elton*, that they are all caſes of a condition abſolutely precedent. It is impoſſible not to ſee, that the teſtator meant the legatee to bring himſelf into the circumſtances ſpecified. In all thoſe caſes the legacy was given upon a marriage with a given conſent. It is impoſſible in that ſort of caſe to ſay, the legatee could be entitled without that. It would be to put a violation upon the very words of the bequeſt. Therefore the plaintiff's counſel are fully juſtified in ſaying, thoſe caſes cannot be brought to bear upon this queſtion. They are caſes of legacies, and conditions precedent. They were conſidered and determined as ſuch.

For the defendant, beſides the caſes, I have mentioned, the late caſe of *Batsford* v. *Kebbell* was relied on; in which the Lord Chancellor took a great diſtinction between a bequeſt of a ſum of money payable at a future time and a gift of the intereſt until a certain time and then a gift of the principal. His Lordſhip gives a ſhort judgment; but upon conſideration of all the caſes he laid it down, that it is neceſſary to ſhew, the principal was intended to be given, before the time arrived; and in that caſe he for that reaſon held, the legacy (for that was the caſe of a legacy) never attached.

It is to be conſidered, whether this caſe is in it's circumſtances diſtinguiſhable from all theſe caſes; and I am of opinion, it is. It is diſtinguiſhed from *Batsford* v. *Kebbell* in this reſpect; that this is in fact an abſolute gift of the reſidue to truſtees. It may be ſaid, ſo much of the truſt as is not ſufficiently declared muſt go to the perſon, who would be entitled, in caſe there was no diſpoſition: but I think, it is equivalent to ſaying, in truſt for them, to pay and diſpoſe of the dividends and intereſt to them till their reſpective marriages, and then to aſſign and transfer the principal; for it is not merely a gift of the intereſt until marriage, ſtopping there, and after the marriage a gift of the principal: but it is impoſſible not to ſee, that theſe words are equivalent to a gift of the principal. The teſtator conſiders it as given. He ſpeaks of it as their ſhares of the reſidue. The day of their marriage is the time, at which they are to be put into actual poſſeſſion of their ſhares. I cannot conſtrue this otherwiſe than an abſolute gift of the reſidue, qualified only thus, that until their marriages, until when, I ſuppoſe, he thought, they would not want it, they were not to have the actual poſſeſſion.

That there is a difference between a bequeſt of a legacy and a reſidue with reference to this point cannot be denied either upon principle or precedent. Every intendment is to be made againſt holding a man to die inteſtate, who ſits down to diſpoſe of the reſidue of his property. How did this teſtator diſpoſe of it? It might be ſuppoſed natural, that they would marry. It might be in his idea, that there might be a poſſibility, that they might not marry. If he did not mean by the reſiduary bequeſt to diſpoſe of the abſolute intereſt, it was natural, that he ſhould declare, what ſhould be the caſe, if they ſhould not marry. He has not done that. So much as to the principle.

Next, how far in point of precedent has a gift of the reſidue been held diſtinguiſhed from a mere legacy. In *Monkhouſe* v. *Holme*, 1 *Bro. C. C.* 298. Lord *Loughborough* comments upon all the caſes; and among others mentions *Love* v. *L'Eſtrange*; upon which I mainly rely in this caſe. His Lordſhip ſays, that caſe was determined upon the ground of it's being a reſidue; and, if the report is correct, he gives a decided opinion, that *Love* v. *L'Eſtrange*, if it had not been the caſe of a reſidue, would not have been decided, as it was; being of opinion, that, if it had not been the caſe of a reſidue, but a legacy, it would not have been a veſted intereſt. I am not now commenting upon the point, whether that argument ſtrictly applies to *Love* v. *L'Eſtrange*. It is enough for me to avail myſelf of Lord *Loughborough*'s comment upon it; who was evidently of that opinion upon the ground, upon which *Batsford* v. *Kebbell* was decided. In *Monkhouſe* v. *Holme* Lord *Loughborough* ſeems to be of opinion, as he was in *Batsford* v. *Kebbell*, that in *Love* v. *L'Eſtrange*, there being no gift of the principal until the age of twenty-four, and only a partial gift in the mean time, from the age of twenty-one, not ſo much as the intereſt, the principal could not attach until that time, unleſs upon it's being the caſe of a reſidue; which diſtinguiſhed it from *Batsford* v. *Kebbell*, a caſe in other reſpects very like it. I do not find, that is mainly inſiſted on in the printed caſe of *Love* v. *L'Eſtrange*; and I ſee, in *May* v. *Wood* I ſtated that fact, that it was not inſiſted on; and that I did not ſee any difference between the caſes of a legacy and a reſidue. If I did ſay ſo, I ſpoke with too much latitude; for I then thought, and I now think, there is a diſtinction; though in that caſe it made no difference; the words being ſo like thoſe in *Doe* v. *Lea*, and *Goodtitle* v. *Whitby*; in the latter of which ſome principles are laid down by Lord *Mansfield*, with regard to all words, that may be conſtrued words of reference to the time, at which poſſeſſion is to be given, and not words of condition, that ſeem to me to govern the deciſion of this caſe. The firſt principle laid down by Lord

Where the whole property is deviſed, with a particular intereſt given out of it, it operates by way of exception out of the abſolute property.

Mansfield is, that wherever the whole property is deviſed, with a particular intereſt given out of it, it operates by way of exception out of the abſolute property.

In that caſe the eſtates were given to truſtees and their heirs, upon truſt to apply the rents and profits for the maintenance and education of the nephews of the deviſor during their minorities; and when and as they ſhould reſpectively attain the age of twenty-one then to the uſe of his ſaid nephews.

Another principle laid down by Lord *Mansfield* is, that, where an abſolute property is given, and a particular intereſt given in the mean time, as until the deviſee ſhall come of age, &c, and when he ſhall come of age, &c, then to him, &c, the rule is, that ſhall not operate as a condition precedent, but as a deſcription of the time, when the remainder-man is to take in poſſeſſion.

Where an abſolute property is given by will, and a particular intereſt is given in the mean time, it is not a condition precedent, but a deſcription of the time, when poſſeſſion is to be taken.

If this will had mentioned a particular age inſtead of marriage, there could be no doubt, that theſe caſes would have abſolutely governed it; for though I do not deny, that *dies incertus in teſtamento conditionem facit*, I ſay, admitting that principle, that marriage is the time, at which they were to be put in poſſeſſion. It is true, the teſtator fixes the marriage to the time, at which they were to be put in poſſeſſion. It is not a marriage under any qualification, but whenever they ſhould marry. Where is the abſurdity, that that time ſhould be fixed, as the time for their being put into poſſeſſion? The teſtator thought that the time at which they might want it, and until which it would be better applied upon that truſt for their benefit.

Therefore without breaking in upon that rule of the Civil Law, or the caſes before Lord *Hardwicke*, to whoſe doctrine I wiſh to refer, that, it is impoſſible not to ſee, that the teſtator in thoſe caſes did mean thoſe circumſtances to be conditional, I am of opinion, there is nothing in this will to ſhew a condition precedent to the veſting of this intereſt. Another reaſon may be given. Suppoſe, one of theſe ſiſters had married, and had children: this interpretation puts it in the power of the other to provide for thoſe children. It has been determined, that where a legacy is given, payable at the age of twenty-four, the legatee at the age of twenty-one may diſpoſe of it by will. The ſame reaſon applies to this caſe.

see 3. Bro. Cha. Cas. 471. & 3. Durnf. & East 42.

Upon theſe circumſtances, and the ground, that this is a reſidue, and upon the words of the bequeſt in this caſe, I am of opinion, that the plaintiff is well entitled under the will of her ſiſter to her ſhare of the reſidue.

The Counſel for the plaintiff applied for a direction for payment of her moiety.

Maſter of the Rolls.—I doubt as to giving that direction. In all theſe caſes the Court has never yet accelerated the payment. It may be a veſted intereſt, and diſpoſable, but not tangible in the mean time. It is worth conſideration upon the queſtion, whether the ſurvivor has any right to demand payment and to be put in poſſeſſion of this veſted intereſt until the day of her marriage. Suppoſe, in *Love* v. *L'Eſtrange*, where the teſtator had anxiouſly given only 10*l.* a-year till *Walter Naſh* ſhould attain the age of twenty-four, having attained the age of twenty-one he had brought his bill: does it follow, that he would have been put in poſſeſſion? No other perſon could have had any advantage from it in that caſe. It is like the caſe of an infant, who may diſpoſe of property, though he cannot have poſſeſſion of it, until he is of age. I will conſider of this point. I am not ſure, it may not be a wiſe proviſion, intended for the benefit of the legatee.

By the decree it was declared, that the plaintiff *Ann Booth* and the defendant *Richard Booth* as executor and executrix of the teſtatrix *Phœbe Booth* are entitled to one moiety of the Bank Annuities and Bank Stock, conſtituting the clear reſidue of the perſonal eſtate of the teſtator *Robert Bragge*, and it was ordered, that one moiety of the ſaid Bank Annuities and Bank Stock be transferred accordingly, to be applied by them to the purpoſes in the ſaid teſtatrix's will mentioned; and that the intereſt and dividends to accrue due on the other moiety of the ſaid Bank Annuities and Bank Stock be from time to time paid to the ſaid *Ann Booth* during her life; and in caſe of her marriage the ſaid *Ann Booth*, or in caſe of her death before marriage any other perſon intereſted in the ſaid Bank Annuities and Bank Stock, are to be at liberty to apply to the Court, as there ſhall be occaſion.

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1798, *Feb.* 5th.
1799, *Feb.* 9th.

Account between principal and agent ſettled from looſe papers; the agent having kept no regular books: after his death liberty was given to ſurcharge and falſify upon allegation of errors ſince diſcovered.

Agent employed to ſell eſtates, took them for himſelf under colour of a fictitious purchaſe; and ſold part: after his death an inquiry was directed to aſcertain the real value; according to which his eſtate was to be charged: the principal having an option to take what remained unſold; and, the agent having fraudulently prevailed on his principal to execute a leaſe at a rent under the real value, the agent's eſtate was charged with the loſs ariſing from that.

Charles de Laet Eſq. had been employed by the late Lord *Hardwicke* for ſeveral years as receiver and manager of his eſtates in the counties of *Middleſex* and *Hertford*, and continued to act in that capacity after his Lordſhip's death down to the year 1792. Mr. *De Laet* having been for ſome time much preſſed by the preſent Lord *Hardwicke*, who had attained the age of twenty-one in 1783, to give an account of his receiverſhip, and producing only looſe papers, and acknowledging, that he had kept no regular books of account, it was agreed, that *Edward Ruſſell* ſhould be employed for the purpoſe of inveſtigating his receipts and payments. *De Laet* furniſhed *Ruſſell* with twenty-one annual accounts, commencing at *Michaelmas* 1770, and ending at *Michaelmas* 1791, but made out from looſe and irregular papers. In the courſe of making out this account, which took up above two years, ſeveral errors, falſe charges, overcharges, and omiſſions, were pointed out, ſome by *De Laet* himſelf; and upon a balance of the account of errors the ſum of 1650*l.* 0*s.* 1*d.* appeared to be due to Lord *Hardwicke* in that reſpect; which account was admitted by *De Laet*, and ſigned by him; including errors down to the 19th of *May* 1792. The general balance due to Lord *Hardwicke* upon the account ſo made out was 69*l.* 8*s.* 10½*d.*; which was paid by *De Laet*; and a bond of indemnity in the penalty of 9000*l.* againſt ſuch payments charged by *De Laet* in the account, for which he could produce no vouchers, was executed by him to Lord *Hardwicke* upon the 12th of *May* 1792. *De Laet* alſo paid *Ruſſell* 200*l.* as a compenſation for his trouble in inveſtigating the acccount.

In 1786 *De Laet* being employed by Lord *Hardwicke* to ſell certain eſtates ſold them to *John Wright* for the ſum of 5550*l.*

By indentures of leaſe, dated the 26th of *February* 1790, certain tithes, called the *Ridge* tithes and *Almoners* tithes, and certain woods, called *Tittenhanger*, all being the property of Lord *Hardwicke*, were let to *Juſtinian Caſamajor* Eſq. for a term of twenty-three years from the 12th of *May* preceding at the yearly rent of 196*l.*, and ſubject to other annual outgoings to the amount of 71*l.* 4*s.* 6*d.* This affair was tranſacted wholly by *De Laet*.

In *June* 1792 *De Laet* died; having deviſed his real eſtates in the counties of *Middleſex* and *Hertford* to *Juſtinian Caſamajor* Eſq. for life, with remainder to his ſon *William Charles Caſamajor* and his iſſue male in ſtrict ſettlement, with various remainders over, the ultimate remainder to *Juſtinian Caſamajor* and *Humphry Sibthorp* in fee; and he diſpoſed of all the reſidue of his real and perſonal eſtates upon the truſts therein mentioned.

The bill filed by Lord *Hardwicke* againſt the executors and deviſees of *De Laet* had three objects: Firſt, to open the account, upon charges of errors, falſe charges, overcharges, and omiſſions, diſcovered by *Ruſſell* ſince the death of *De Laet* to the amount of 4644*l.* 10*s.* 9*d.*

Secondly; as to the eſtates ſold to *Wright.* With reſpect to thoſe eſtates, the bill charged, that they were ſold for much leſs than their real value; and that *De Laet* agreed to ſell them to *Wright* for the ſum of 5550*l.* upon condition or under ſome agreement or underſtanding, that *Wright* ſhould convey to *De Laet* a meadow, called *Sleapſide* Meadow, part of the ſame eſtates, without any conſideration or for ſome inadequate conſideration; which meadow was conveyed accordingly; and *De Laet* continued in poſſeſſion of the ſaid meadow till his death; and ſince that time the defendant *Caſamajor* has been in poſſeſſion under his will:

Thirdly; as to the leaſe of the tithes and woods to *Caſamajor.* The bill charged, that in and ſince the year 1786 the ſaid tithes and woods were worth yearly between 4 and 500*l.*, to be let upon a leaſe for twenty-one years; and that *Levi Lavender*, one of the plaintiff's tenants, applied for ſuch leaſe to *De Laet*; who offered it to him at a rent of 500*l.* a-year. *Lavender* offered to take it at a rent of 400*l.* a-year, which *De Laet* refuſed.

The bill therefore prayed a general account of all dealings and tranſactions of *De Laet* with regard to the plaintiff, and of all ſums of money received and paid by *De Laet* on account of the plaintiff or his eſtates during the time aforeſaid; and that the difference between the ſum of 5550*l.*, for which *De Laet* ſold the ſaid eſtates to *Wright*, and the real value of the ſaid eſtates, including *Sleapſide* Meadow, at the time of ſuch ſale may be aſcertained; and alſo, that the damage ſuſtained by the plaintiff by reaſon of the ſaid leaſe being made for the rent of 196*l.* may be aſcertained; or that the ſaid leaſe may be declared void, and be delivered up to be cancelled; and that the defendant *Caſamajor* may be decreed to deliver up poſſeſſion of the premiſes included therein, and account for the real value of ſuch premiſes from the date of the leaſe.

The bill, as far as it ſought to open the account, was reſiſted on the ground, that the account ſtated by *Ruſſell* was conſidered by all parties as a final ſettlement, not by *De Laet* only, but by the plaintiff himſelf.

In ſupport of that objection the defendants relied on the payments of the balance to the plaintiff and the ſum of 200*l.* to *Ruſſell*, the acceptance of the bond of indemnity, and a letter from the plaintiff to *De Laet*, dated the 4th of *May* 1792, before the payment of the balance; in which the plaintiff after expreſſing his concern, that it was not in his power to write ſooner concerning the final determination of the matters then depending between them, proceeds thus:

"The inveſtigation of Mr. *Ruſſell* has only put the accounts in "the form, in which they ought to have been drawn up each "year; and therefore I think it perfectly right and fair, that you "ſhould pay the expence of that inveſtigation. It is alſo right, "that I ſhould be indemnified by you againſt the chance of paying ſuch bills as are in your accounts ſtated to have been paid. "For this reaſon Mr. *Ruſſell* waits upon you with a bond for that "purpoſe; the execution of which by you together with the inſtrument accompanying it will ſecure me againſt ſuch contingency. After this I ſhall not be deſirous of continuing in any "reſpect a creditor of yours: nor ſhall I wiſh to receive from "you any thing more than what I can prove myſelf entitled to. "The errors and omiſſions will leave a balance in my favor after "payment of your ſalary. This I ſhall ſtate to you as ſoon as "poſſible; and after that I am ready to ſend you a full releaſe. "I think, Mr. *Ruſſell* ſhould have the ſum of 200 guineas paid "him for the expence and trouble of the inveſtigation; and to "which I truſt you will have no objection."

On the other ſide the letters of *De Laet* were produced, declaring, that the plaintiff ſhould not loſe a ſhilling by him; that he

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he, or his executors, if he ſhould die, would pay the laſt farthing, &c.

The defendant *Caſamajor* by his anſwer ſubmitted, that *Ruſſell* being nearly two years employed in the inveſtigation, and having had all the aſſiſtance and information *De Laet* could give him, it is not probable, that *Ruſſell* can have any better information than he might have obtained in the life of *De Laet*. Beſides, as ſuch account has been made out ſince the death of *De Laet*, it muſt be conſidered as a partial account; and if *De Laet* had been living, he might have given full anſwers and explanations to the charges made. Therefore, and as infants are intereſted in his real and perſonal eſtate, the defendant ſubmits, that the account ſettled in *De Laet*'s lifetime ought not to be opened; and, if there is any queſtion, whether the account ſhould be opened, or not, it ought to be by a charge before the Maſter in the cauſe inſtituted by the executors of *De Laet* for taking the accounts of his perſonal eſtate, &c. As to the *Sleapſide* Meadow, the defendant *Caſamajor* admitted, that he was in poſſeſſion of that meadow ſince *De Laet*'s death; and that he had ſeen a conveyance of it dated the 7th of *May* 1789, from *Browne*, a truſtee, and *Wright*, to *De Laet* in fee in conſideration of 160*l.*; the receipt of which ſum was acknowledged upon the back, ſigned by *Wright*. He believed, the meadow was let at 7*l.* a-year.

John Wright depoſed, that in 1788 *De Laet* told him, if he had any money to ſpare, he (*De Laet*) could buy him an eſtate, by which he could make ſome money for the deponent. He anſwered, he had 1800*l.* Soon afterwards *De Laet* informed him, he had bought the eſtate, but it came to much more money; but that he himſelf would find the reſt. Soon afterwards he procured the ſaid eſtate to be conveyed to the deponent; and afterwards informed him, he (*De Laet*) could diſpoſe of ſuch eſtate again to different people; and he accordingly afterwards diſpoſed of part thereof to three different perſons: *viz.* Mr. *Ridge*, Captain *Lambert*, and a merchant in the city, whoſe name the deponent does not recollect; and the deponent executed conveyances of ſuch parts, but, he believes, not the whole of the ſaid eſtate; at which time *De Laet* paid him 1900*l.* About a month before the death of *De Laet* the deponent executed a conveyance at his houſe, and does not know of what, unleſs the ſaid field; having executed it in confidence of the repreſentation of *Vernon* and *De Laet*, that it was neceſſary for him to do ſo without knowing the purport. The deponent received no profit from the tranſaction except 100*l.* more than the 1800*l*, he had advanced.

Levi Lavender depoſed, that he was employed ſeveral years in the management of the woods, compriſed in *Caſamajor*'s leaſe, by *De Laet*; who in 1786 offered to let the ſaid woods and the tithes compriſed in the ſaid leaſe for a rent of 500*l.* a-year. The deponent offered 400*l.* a-year. He conceived them worth that rent for twenty-one years; and would now give it. When the tithes were raiſed by *De Laet*, the deponent's tithes were not raiſed: but *De Laet* deſired him to attend the meeting, and to ſay, that he had ſettled his tithes with *De Laet*.

Attorney General and Mr. Grant for the plaintiff.—Upon the firſt point, this is not a ſettled account; and if it is, this Court will not conſider it ſo under ſuch circumſtances. The letters of *De Laet* ſhew, that it was not his intention, that theſe accounts ſhould be final and concluſive. There was no intention on either ſide to have the account conſidered as cloſed. *Ruſſell* had no authority to make a concluſive ſettlement of the account. He was not an arbitrator. He was employed in the mere capacity of an accountant. He was paid by *De Laet* for ſtating the account for him; and had *De Laet*'s aſſent to every alteration. He was obliged to ſtate the account from *De Laet*'s information; and many things were conſidered unadjuſted. The plaintiff thought, that, when the account ſhould be ſettled, a releaſe was to be given. Upon the whole of this caſe the plaintiff is entitled at his option either to open the account generally or to be at liberty to ſurcharge and falſify.

As to the tranſaction of the ſale to *Wright* and the conveyance of the *Sleapſide* Meadow, part of that eſtate, to *De Laet* without conſideration, an inquiry muſt be directed as to the value of the eſtates ſold; and if it ſhall be found to exceed the ſum of 5550*l.*, the price, that was paid, the exceſs muſt be anſwered out of the eſtate of *De Laet*. With reſpect to the *Sleapſide* Meadow, the plaintiff muſt have the option to take it, or to have what ſhall be found to be the real value.

As to the leaſe of the woods and tithes to the defendant *Caſamajor* there is no evidence of fraud in him in obtaining it: but *De Laet* intended in violation of his duty to his principal Lord *Hardwicke* to give *Caſamajor* an advantage in this leaſe. *De Laet* therefore being the agent both of the leſſor and leſſee, it is not fit, that *Caſamajor* ſhould retain the benefit of it. *De Laet*, if he did not ſtudiouſly conceal from the plaintiff, that *Lavender* had been in treaty with him for a leaſe of theſe woods and tithes, certainly never communicated his offer.

Solicitor General and Mr. Manſfield for the defendants contended, that the account ought not to be opened; and they reſiſted the inquiry as to the other points.

LORD CHANCELLOR.—The accounts having been ſo improperly kept, when Lord *Hardwicke* began to look into his own affairs, they came to this arrangement; that an accountant ſhould be employed to prepare a ſtatement of the accounts in a regular form. It appears perfectly underſtood on both ſides, that the account ſhould be ſtated as drawn up by *Ruſſell*, and ſo far as he had gone it is admitted to be an account, that was not to be unravelled, but ſubject to ſuch errors as had not then been ſuggeſted. On both ſides it was expected, that the balance might be much larger.

The juſtice of the caſe is, that the account ſhall ſtand, as ſtated by *Ruſſell*; with liberty to the plaintiff to ſurcharge and falſify.

With reſpect to the other two circumſtances of the cauſe, certainly the tranſaction as to the ſale of the eſtate very much impeaches the morality of *De Laet*'s character. The tranſaction is different from that in *Fox* v. *Mackreth* (*a*), and worſe. The plaintiff employed *De Laet* to ſell theſe eſtates to the beſt advantage. *Wright* is ſet up as the purchaſer. He had no ſpecific knowledge of the purchaſe. The eſtates were ſold in parcels. Part was not ſold. The names of three purchaſers appear: two only were known to *Wright*. *De Laet* was in fact the purchaſer from the plaintiff; and the plain rule of juſtice is, that he ſhould be charged with the actual value of the eſtates.

(*a*) 2 *Bro. C. C.* 400.

As to the *Sleapſide* Meadow, the plaintiff has a right to take that, if he pleaſes.

The decree directed, that the account ſtated by *Ruſſell* up to the 19th of *May* 1792 ſhall ſtand; with liberty to the plaintiff to ſurcharge and falſify.

It was referred to the Maſter, to whom the cauſe of *Browne* v. *Caſamajor* (*a*) was referred, to inquire, what was the value of the premiſes conveyed by the plaintiff to *John Wright* by the indentures of the 15th and 16th of *March* 1787, in conſideration of 5550*l.*, at the time the ſame were ſo conveyed, and to diſtinguiſh what was the value of the ſaid premiſes reſpectively; and to inquire, to whom the ſaid premiſes or any of them were ſold or conveyed by *Wright* or *De Laet;* and what were the prices paid for the ſeveral parcels of the ſaid premiſes reſpectively: the plaintiff to be at liberty to elect, whether to abide by the valuation of the ſaid eſtates, or by the prices, at which the ſame were ſold; and, as to the *Sleapſide* Meadow conveyed by *Wright* to *De Laet* for the nominal conſideration of 160*l.*, the plaintiff to elect, whether he will accept of what ſhall appear upon the inquiry to be the value thereof, or whether he will inſiſt upon the ſame as owner thereof. It was farther directed, that the parties ſhall proceed to a trial at law by a ſpecial jury at the next aſſizes for the county of *Hertford* upon the following iſſue:

What was the annual value between the years 1786 and 1790 of the tithes, woods, and premiſes, compriſed in the leaſe, dated the 26th of *February* 1790, granted by the plaintiff to *John Caſamajor*, to be let to a tenant for a term of twenty-three years, ſubject to the covenants, payments, and outgoings, in the leaſe mentioned on the part of the leſſee.

Upon the trial of that iſſue the verdict was, that the tithes, woods, and premiſes, in the ſaid leaſe mentioned, to be let to a tenant for a term of twenty-three years, ſubject to the covenants, payments and out-goings, on the part of the leſſee, were

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(*a*) The cauſe inſtituted by the executors of *De Laet* for eſtabliſhing his will and taking the accounts.

worth

1799. Lord HARDWICKE *v.* VERNON.

worth a clear rent of 320*l.* a-year between the years 1786 and 1790.

1799. *Feb* 9th.

The cauſe was brought on for farther directions upon that branch only, that was the ſubject of the iſſue.

The Attorney General and Mr. Grant for the plaintiff preſſed for an account of the loſs incurred by him in reſpect of the leaſe againſt the eſtate of *De Laet* upon the foot of the verdict.

The Solicitor General and Mr. Manſfield for the defendants complained in ſtrong terms of the verdict; which was obtained chiefly upon the evidence of *Lavender:* but they did not deſire a new trial.

They alſo contended, that it was a new equity to aſk damages againſt the eſtate in reſpect of a loſs ariſing from a tort, that died with the perſon.

Lord Chancellor upon that objection obſerved, that it was a fraud; and though an action, ſounding in damages dies with the perſon, the ground of juriſdiction in equity is, that it is a debt (*a*).

The decree therefore directing the account, Mr. *Caſamajor* rather than account in reſpect of the remainder of the term at the rate eſtabliſhed by the verdict offered to give up the leaſe.

(*a*) See *The Biſhop of Wincheſter* v. *Knight*, 1 *P. Will.* 406.

CORBYN *v.* FRENCH.

Rolls. *Feb.* 14th, 16th, 18th.

Legacy to the truſtees of a chapel for Proteſtant Diſſenters, to be applied by them towards the diſcharge of the mortgage on the ſaid chapel, is void under the *Statute* 9 *Geo.* 2. *c.* 36. The mortgage having been paid off by other funds in the teſtator's life, the Court would not ſay, the legacy might not have been applied in repairing or ſuſtaining the chapel; but was of opinion, it could not be applied to any other charitable purpoſe.

Bequeſt of the reſidue to *A.* for life; and after her death legacies were given to *B.* or to her proper repreſentative, in caſe ſhe ſhould not be living at the deceaſe of *A.*, and to four other perſons or their repreſentatives or repreſentative: one of the four died in the life of the teſtator: and another ſurvived him, but died in the life of *A.*: the former lapſed; the latter veſted.

JOHN BROWN by his will, dated the 18th of *June* 1785, after giving ſome ſpecific and pecuniary legacies gave and bequeathed the reſidue of his property in the following manner:

"The reſt and reſidue of my eſtate and effects of what kind "ſoever I direct may be diſpoſed of and the money ariſing from "the

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“ the ſale to be paid unto my ſaid truſtees to be by them inveſted in
“ the Public Funds or in ſome other good ſecurity at their diſcretion,
“ and the intereſt thereof to be paid to my dear wife *Elizabeth*
“ during her natural life: at her deceaſe I direct, that the ſum of
“ 500*l.* be paid to the truſtees of the chapel in *Eſſex-ſtreet* (where-
“ of the Reverend Mr. *Lindſay* and the Reverend Doctor *Diſney*
“ are miniſters) to be applied by them towards the diſcharge of
“ the mortgage on the ſaid chapel: And I further give and be-
“ queath to my aforeſaid niece *Elizabeth Cooper* the ſum of 2000*l.*
“ or to her proper repreſentative in caſe ſhe ſhould not be living at
“ the deceaſe of my wife. I alſo give to each of the children of
“ my ſiſter *Elizabeth*, viz. *John*, *Dorothy*, *William*, and *Chriſtopher*,
“ or their repreſentatives or repreſentative the ſum of 2000*l.* The
“ remainder I direct to be equally divided between *Joſiah Meſſer*
“ aforeſaid and *John*, the ſon of my very worthy and much re-
“ ſpected friend and partner *Thomas Corbyn*, ſhare and ſhare alike.”

The teſtator appointed —— *French* and *Joſiah Meſſer*, whom he had nominated as truſtees, and —— *Stacey* to be his executors.

By a codicil, dated the 13th of *Auguſt* 1787, after giving ſome legacies he proceeded thus:

“ At the deceaſe of my dear wife I give unto *Thomas Rogers*,
“ *Matthew Twogood*, and *Michael Dodſon*, Eſquires, treaſurers to
“ the new Academical Inſtitution among Proteſtant Diſſenters or to
“ the treaſurers at the time the ſum of 2000*l.* to be by them ap-
“ plied upon the purpoſes of the ſaid Inſtitution: the remainder
“ after payment of all legacies *&c.* as before directed by my will.”

The teſtator died in 1788. *Elizabeth Brown*, his widow, died upon the 24th of *December* 1797.

John Barker, one of the children of the teſtator's ſiſter *Elizabeth*, died during the life of the teſtator; leaving a widow and children. *Chriſtopher Barker*, another ſon of the teſtator's ſiſter, died ſoon after the death of the teſtator, but during the life of his widow.

The bill was filed by *John Corbyn*, one of the reſiduary legatees, praying an account of the perſonal eſtate, debts, &c; that the ſaid two legacies of 2000*l.* each given to *John* and *Chriſtopher Barker*, and alſo the legacy of 500*l.* to the truſtees of the *Eſſex-ſtreet* Chapel, and the legacy of 2000*l.* to the treaſurers of the

Academical Inſtitution for Proteſtant Diſſenters, may be declared void, and to have fallen into the reſidue.

The truſtees for the Chapel in *Eſſex ſtreet* by their anſwer ſtated, that they believe, the Chapel, or the equity of redemption thereof ſubject to a mortgage, upon which was then due the ſum of 886 *l.* 10 *s.* and ſome intereſt, was in *January* 1783 conveyed to and veſted in certain truſtees in fee-ſimple for the public worſhip and ſervice of Almighty God therein; and that the ſaid Chapel and premiſes belonging to the ſame were on or about the 25th of *March* 1779 conveyed to the defendant *Godfrey Kettle* in fee-ſimple for the purpoſe of ſecuring the repayment of 1000 *l.* and intereſt; which principal ſum had been previouſly advanced by the Reverend *Theophilus Lindſay* upon the ſecurity of the ſaid premiſes, and for whoſe benefit *Godfrey Kettle* was a truſtee.

They admit, that on or about the 6th of *December* 1781 the ſum of 113 *l.* 10 *s.*, part of the ſaid ſum of 1000 *l.*, was paid off and diſcharged; and that the ſum of 886 *l.* 10 *s.*, being the remainder of the ſaid ſum of 1000 *l.*, was paid off and diſcharged on or before the 19th of *March* 1785 by a donation by one Mr. *Brookſbank*; and that the ſame premiſes were reconveyed by the defendant *Kettle* by the direction of *Theophilus Lindſay* to the perſons, who were at that time truſtees of the Chapel; and they ſay, the ſaid mortgage was ſo paid off and diſcharged in the life of the teſtator and before the date and execution of his will.

The bill ſtated, that the Academical Inſtitution mentioned in the codicil was formed for teaching and promoting certain religious tenets and ſentiments; which differ from the eſtabliſhed religion; that certain lands at *Hackney* were veſted in truſtees for the purpoſes of the ſaid inſtitution; and part of the inſtitution was, that it ſhould be for ever carried on upon the ſaid premiſes. The bill then ſuggeſted, that at the death of *Elizabeth Brown* the Inſtitution had ceaſed: but upon the anſwers of the truſtees this part of the bill was given up.

The queſtions were, firſt, whether the legacy to the *Eſſex-ſtreet* Chapel was void within the *Statute* (*a*):

Secondly, if the legacy was not void by the *Statute*, whether, the expreſs purpoſe of it having been ſatisfied by other means, that inſtution could have the benefit of it for any other purpoſe:

(*a*) 9 *Geo.* 2. *c.* 36.

Thirdly, whether the legacies to *John* and *Chriſtopher Barker* or their repreſentatives failed in conſequence of their deaths.

Mr. Owen for the plaintiff, and Mr. Richards for the defendant Meſſer, the other reſiduary legatee.—The queſtion upon the *Statute* ſeems ſo clear, that it is ſcarcely poſſible to argue it without hearing what can be ſaid in ſupport of the legacy. It cannot be diſtinguiſhed from a bequeſt of a term for years, or a direction to the truſtees to purchaſe a term for years. In *Widmore* v. *The Governors of Queen Ann's Bounty*, 1 *Bro. C. C.* 13, 33. (*n*), the legacy was held void upon the ground, that now by the regulations, that Corporation has made, every thing given to them muſt be laid out in land. There is no difference between giving a mortgage to a charity and giving a ſum of money to be laid out upon a mortgage. There is an apparent diſtinction between this caſe and thoſe, in which gifts of money to be laid out upon land already in *Mortmain* have been ſuſtained; as, where money is bequeathed to beautify or repair a chapel already erected.

Upon the ſecond queſtion, ſuppoſing this legacy not void by the *Statute*, the mortgage having been paid off, and therefore the object of the legacy not being in exiſtence, it is adeemed; like a legacy of a horſe, which does not exiſt at the death of the teſtator. The particular object cannot now be anſwered. There is no ſuch incumbrance to be removed. The legacy is given only for the ſpecial purpoſe of paying of that incumbrance, not for the general purpoſes of the Inſtitution. There is no intimation of an intention to give them this legacy, in caſe the mortgage was removed. If a legacy is given for the purpoſe of building a church, and they will not take it for that purpoſe, the legacy is gone: *Attorney General* v. *The Biſhop of Oxford*, 1 *Bro. C. C. Appendix* 21 (*a*).

There is no general charitable intention, under which the Crown can have a right to appoint; the particular purpoſe having failed. It may be doubtful, whether this Inſtitution is a charity. It is to ſupport a chapel, in which are to be received ſuch perſons as chooſe to attend their mode of worſhip, differing from the eſtabliſhed church. Is that a charity; and ſhall this fund go as a

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(*a*) See the end of that cauſe ſtated in the judgment from the Regiſter's Book.

ſum devoted generally to charitable purpoſes, and to be applied by the Crown? The particular object has failed: there is no intimation of any other; and there is no general charitable purpoſe.

Upon the third queſtion, both the legacies to *John* and *Chriſtopher Barker* have failed by the death of the former during the life of the teſtator, and of the latter during that of his widow. In *Cooper* v. *Thornton*, 3 *Bro. C. C.* 96, 186, the children took an immediate intereſt. It would be going a great way to inſert the words "in caſe of their deaths in my life or the life of my "wife;" eſpecially as the legacy immediately preceding contains ſuch a proviſion. It is like a legacy to a perſon, who does not exiſt: *Maybank* v. *Brooks*, 1 *Bro. C. C.* 84. *Hutcheſon* v. *Hammond*, 3 *Bro. C. C.* 128.

Mr. Piggott and Mr. Romilly for the truſtees of the Eſſex-ſtreet Chapel, defendants.—This is undoubtedly a charitable purpoſe: *Attorney General* v. *Cock*, 2 *Veſ.* 273.

As to the objection upon the *Statute*, this is an intereſt in land already in *mortmain*. Therefore it does not fall within the authorities, that a mortgage, or a leaſe, or a rent, is within the *Statute*. That only holds, where the land is not already in *mortmain*: but you may lay out money upon land already in *mortmain*. It was not the object of the *Statute* to prevent land already in *mortmain* from being improved. The object was to prevent *new* land from being brought into *mortmain*. It is aſſumed, that giving money to pay off a mortgage is exactly the ſame as if the mortgagee was to give the mortgage: but it would not be unlawful for a mortgagee to give the mortgage directly, if the land was already in *mortmain*. The mortgagee might by his will have given the mortgage to theſe truſtees having the equity of redemption. A mortgage is certainly conſidered merely as a debt; though in ſtrictneſs the mortgagee has the legal eſtate. A deviſe of a mortgage would be only removing the incumbrance, and improving property already in *mortmain*. It would not be bringing new land into *mortmain*; and to prevent that is the principle of the *Statute*; as Lord *Camden* held in *Widmore* v. *The Governors of Queen Ann's Bounty*; and that diſtinction that a bequeſt of money to be laid out in land is good, if the land is already in *mortmain*, and void, if not, prevailed in *Brodie* v. *The Duke of Chandos*, and

The Attorney-General v. *Hutchinſon* (*a*), and in other caſes: *Glubb* v. *The Attorney General*, *Harris* v. *Barnes*, *Amb.* 373, 651. *Attorney General* v. *The Biſhop of Cheſter*, 1 *Bro. C. C.* 444. The *Statute* had two objects; firſt, to prevent the diſinheriting of heirs; ſecondly to prevent putting lands into a ſtate of perpetuity. The principle with reſpect to the ſecond object is, that the land is taken out of circulation. Upon that principle it has been decided, that a bequeſt of money to be laid out upon land already in *mortmain*, no matter to what amount, is good. That principle reaches this caſe. Where property is given to diſincumber an eſtate already in *mortmain*, it is in point of principle the ſame as if it is given to improve land already in *mortmain.* The Court have gone ſo far as to ſay, that, where the land is given by another perſon, the money may be uſed: ſo, where the body, for whoſe benefit the bequeſt is made, had land already in *mortmain*. The Court have availed themſelves of all thoſe diſtinctions; and have conſtantly ſaid, the bequeſt ſhould be ſupported, unleſs it is to purchaſe land, and bring new land into *mortmain.*

Many caſes upon the *Statute* are to be looked on as caſes of poſitive law, and are not within the principle.

Upon the ſecond point, this diſpoſition was intended ſubſtantially for the benefit of the Chapel. The application of the money is directed to that, which the teſtator might think the moſt urgent purpoſe: but the exiſtence of the mortgage is not of the eſſence of the gift. The gift is to the truſtees. The application is to be by them, not by the executors. It would be a ſingular conſtruction, that becauſe the teſtator has pointed out the mode, in which he wiſhed this legacy, intended ſubſtantially as a benefit to the Chapel, to be applied, that ſhould be turned into a condition precedent in a Court of juſtice, which is favorable to charities. The direction to apply the money diſtinguiſhes between the object and the mode: a diſtinction frequently laid down by Lord *Thurlow*. The object was the Chapel. The application directed was only the mode; that, which the teſtator thought the beſt application for the benefit of that object. This differs eſſentially from *The Attorney General* v. *The Biſhop of Oxford*: there was no election to repair the Church, or to build a Chapel: the only object was to build a Church. In ſuch caſes vanity is the object of the teſtator;

(*a*) Cited in *The Attorney General* v. *The Biſhop of Cheſter*, 1 *Bro. C. C.* 444.

teſtator; to raiſe a monument to his own name: but it cannot be ſaid, this teſtator had any ſuch intention of commemorating himſelf. The ademption of a legacy depends upon the teſtator; who muſt do ſome act to adeem: as, where a ſpecific legacy is ſold by the teſtator. According to this argument it would depend upon the act, not of the teſtator, but the truſtees; upon the accident, whether they ſhould apply any other fund to pay off this mortgage, or not. Suppoſe, it had been paid off in part only by *Brookſbank*'s donation: upon this ground it muſt be contended, that the legacy is good only to the extent of what remained due. They might go farther; and ſay nothing was due.

Conſider this as a legacy to an individual to be applied towards paying off a mortgage, ſuppoſing him ſeiſed in fee. It would be conſidered as a legacy for his benefit; and if he did not want it for the purpoſe of paying off the mortgage, the Court would never compel him ſo to apply it. There are not many caſes to be found upon the ſubject. In 2 *Leon.* 154, and 3 *Leon.* 65, the deviſe of a rent-charge to a ſon towards his education and bringing up in learning was held not conditional. The ſame conſtruction was made upon a legacy to place a boy out apprentice in *Barlow* v. *Grant*, 1 *Vern.* 255, and *Nevill* v. *Nevill*, 2 *Vern.* 431. There are however many caſes in this Court of the ſame nature; as where a legacy is given for the maintenance and education of children, it has been ordered to accumulate for their benefit, if the father is of ability to maintain them (*a*). So upon a legacy for mourning or for a ring it has never been held, that the legatee is to be compelled to that application.

It muſt be ſaid, that the only wiſh of this teſtator was, that there ſhould be no mortgage upon this Chapel, but he did not care for the benefit of it in any other reſpect. That is not a rational object: nor could it be attained; for ſuppoſe the truſtees thought any other mode better: they might pay off the mortgage, and immediately make another, and apply the money to any other purpoſe in their opinion more beneficial. Suppoſe, two teſtators knowing of this mortgage had each bequeathed 500 *l.* for the purpoſe of paying it off: what is to be done? Is there to be a contribution? It is perfectly clear, the object of both is to advance the general purpoſe of the charity. This

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(*a*) *Andrews* v. *Partington*, 3 *Bro. C. C.* 60. But as to the ſtrict rule, that prevailed in that caſe, ſee *Hoſte* v. *Pratt*, *ante*, vol. 3. 730, and *Mundy* v. *Earl Howe*, 4 *Bro. C. C.* 223.

mortgage is not directed to be paid off till after the death of the teſtator's wife. Suppoſe, the mortgage having been paid off, a ſecond mortgage had been made before the death of his wife. If the caſe bears any reſemblance to the caſes of ademption, the legacy could not be applied to that mortgage: but there can be no doubt, there being at the time the Court was to act upon it a mortgage, the charity wanting the legacy for the expreſs purpoſe, for which it was given, the application would be made.

Mr. Hubberſty for the repreſentatives of John and Chriſtopher Barker.—As to the legacy to *John Barker*, the word "*or*" diſtinguiſhes this caſe from *Maybank* v. *Brooks* and *Hutcheſon* v. *Hammond.* That word may make a difference: *Stone* v. *Evans*, *Lowther* v. *Condon*, 2 *Atk.* 86; 127. The former turned upon the clear intention to give to the ſiſter as executrix. In the latter, I admit, an intention appeared, that the legacy ſhould not lapſe. In *Buffar* v. *Bradford*, 2 *Atk.* 220. a legacy to *A.* and the children born of her body ſurvived to a child born after the date of the will. In *Sibley* v. *Cook*, 3 *Atk.* 572 the legacy did not lapſe. That caſe was noticed by the Court in *Bridge* v. *Abbot*, 3 *Bro. C. C.* 224.

As to the legacy to *Chriſtopher Barker*, who ſurvived the teſtator, but died in the life of his wife, the caſe is ſtronger.

Mr. Owen in reply—By the expreſs words of the will the application is confined to that particular mortgage. Paying off that mortgage is in other words purchaſing a term of 500 years in land. It is ſo conſidered by the defendants; who contend, that a deviſe of the mortgage itſelf would be good: but the *Statute* is not confined to land, but extends to any intereſt in land. This is abſolutely an eſtate in land. How are the truſtees to get this eſtate? After a certain time it is an abſolute eſtate in the mortgagee. Upon a bill for redemption there muſt be a reconveyance of the legal eſtate. There is not an end of it merely by paying the money. In the caſe of a legacy to *A.* for the benefit of his children the children are the ſole object; and, if they die, there is an end of it. So in this caſe the paying off this mortgage is the ſole object. It is incumbent upon theſe truſtees to ſhew a truſt, to which this legacy is to be applied.

As to the third queſtion, in *Sibley* v. *Cook* the teſtator declared in terms, that none of the legacies ſhould lapſe. It was there held, that there muſt be a clear intention, that the legacy ſhall not lapſe; and alſo, that the perſons intended to take muſt be diſtinctly pointed out. Theſe caſes were conſidered in *Bridge* v. *Abbot*; and this Court adopted that principle; which was alſo followed by the Court of Exchequer in *Evans* v. *Charles*, 1 *Anſtr.* 128. which went upon particular circumſtances, and by the Lord Chancellor in *Long* v. *Blackall* (*ante*, vol. 3. 486.)

Maſter of the Rolls.—This is certainly a charity.

I feel great difficulty in ſaying, this is not an intereſt in land. If the mortgage itſelf was deviſed to a charity, it would be clearly void. The executor would be deprived of an intereſt in land; and that intereſt would be given by will to a charitable purpoſe.

In *The Attorney General* v. *Andrew*, (*ante*, vol. 3. 633.) the Lord Chancellor has thought it not clear, that the charitable diſpoſition ſhall not be carried into execution, though *Trinity College* refuſes it; and it was referred to the Maſter with that view. I ſuppoſe, that proceeded from the double object, and the intereſt of the other party, *Merchant-Taylors' School.* It may be inferred, that if the teſtator had known, the College would not have accepted it, he would have provided for the other object.

If a truſtee for a charity had contracted for the purchaſe of an eſtate, would not a ſum of money bequeathed to enable him to complete that purchaſe be within the *Statute?*

For the truſtees.—I ſhould feel a difficulty in the caſe of a contract only. The truſtee would have only an equitable eſtate: but a mortgagor is always conſidered as owner of the eſtate, with an incumbrance upon it.

The Maſter of the Rolls was inclined to direct an inquiry into the nature of this Chapel: but afterwards obſerving, that it appeared by the will, that there were Miniſters, he ſeemed to think, that would prevent the neceſſity of the inquiry. However it was admitted on both ſides, that this Chapel was uſed for the purpoſe of

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of public worſhip by a ſociety of Proteſtant Deſſenters, and was duly licenſed under the *Toleration Act*.

Maſter of the Rolls.—The queſtion as to the legacy of 500*l.* under this will is, whether under the late *Statute* (*a*) or on account of the nature of the application of the money to the particular purpoſe therein mentioned it is good or void.

It is inſiſted, that, this being in it's nature a charitable uſe, the bequeſt of this money to be applied in redemption of the mortgage is within the *Statute of Mortmain*, commonly ſo called, but very improperly; for it does not prevent the alienation of land in *Mortmain:* nor was that the object of the *Act*. It has nothing to do with that. The object was to prevent deviſes of land, or any intereſt in land, or bequeſts of money to be laid out in any ſuch intereſt, for any charitable uſe whatſoever.

It is likewiſe inſiſted, that if this legacy is not void under that *Statute*, inaſmuch as at the death of the teſtator the mortgage was paid off, and therefore that object cannot now be attained, it is not applicable to any other purpoſe for the benefit of that ſociety; and as the object pointed out by the will cannot ariſe, the fund will belong to the reſiduary legatees. I am in their favor upon both points: but it is not neceſſary to dwell long upon the ſecond, if I am right upon the firſt.

It was inſiſted, and with ſucceſs, that though the conſtruction of this *Statute* has been extremely rigorous, and many determinations upon it have been thought to carry it even beyond what the Legiſlature had in contemplation at the time; as, for inſtance, when part of a reſidue given to a charity conſiſts of mortgages or other ſecurities upon land, though it was held, that it was not an immediate gift of an intereſt in land, being only what ſhould remain after the debts were paid, and it was melted into money, it was determined, that, as to ſo much of the reſidue as conſiſted of ſecurities upon land, the charity could not take any part of the reſidue ſo conſtituted (*b*); yet there have been repeated determinations, that it is competent to a teſtator, though not to give directly

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(*a*) 9 *Geo.* 2. *c.* 36.

(*b*) *Pickering* v. *Lord Stamford*, *ante*, vol. 2. 272; 581. vol. 3. 332. 492. *Howſe* v. *Chapman*, *poſt.* *Knapp* v. *Williams*, *poſt.* 430. *Attorney General* v. *Caldwell*, *Amb.* 635. *Attorney General* v. *Meyrick*, 2 *Veſ.* 44.

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any intereſt in land to a charitable uſe, to leave a ſum of money for the purpoſe of meliorating, as it is called, any land, or for beautifying, ſuſtaining, or repairing, buildings, already veſted in truſtees for charitable uſes; and no doubt, I believe, is now entertained upon it; and many caſes have been determined upon the diſtinction, whether it is clear, the teſtator meant the money to be applied in erecting, ſuſtaining, or repairing, buildings upon land already veſted in truſtees for charitable uſes, or had any object of having freſh land purchaſed for that purpoſe (*a*).

It is ſaid, this caſe is analogous to thoſe caſes, in which the Court has eſtabliſhed in favor of a charity a diſpoſition, not of an intereſt in land, or of a ſum of money bequeathed for the purchaſe of any intereſt in land, but for the purpoſe of meliorating an eſtate already veſted in truſtees for charitable uſes. I am of opinion, that cannot be conſidered as the true conſtruction of this gift. The words of the *Statute*, which goes far beyond the title, are very expreſs. It is called an *Act* to reſtrain the diſpoſition of lands, whereby the ſame become unalienable. It then recites, that gifts or alienations of lands, tenements, or hereditaments, in *mortmain* are reſtrained by *Magna Charta* and other laws as againſt the common utility; nevertheleſs this public miſchief has of late greatly increaſed by many large and improvident alienations or diſpoſitions to uſes, called charitable uſes (not diſpoſitions in *mortmain*); and the firſt clauſe enacts, that no manors, lands, tenements, rents, advowſons, or other hereditaments, corporeal or incorporeal, whatſoever, nor any ſum or ſums of money, goods, chattels, ſtocks in the Public Funds, ſecurities for money, or any other perſonal eſtate whatſoever, to be laid out or diſpoſed of in the purchaſe of any lands, tenements, or hereditaments, ſhall be conveyed or ſettled to or upon any perſon or perſons, bodies politic or corporate, (that is the only caſe, in which it could be in *mortmain*,) or otherwiſe, for any eſtate or intereſt whatſoever, or anyways charged or incumbered by any perſon or perſons whatſoever, in truſt or for the benefit of any charitable uſes whatſoever, unleſs ſuch gift, conveyance, *&c.* of any ſuch lands, *&c*, money, or perſonal eſtate, (other than ſtocks in the Public Funds,) be made by deed indented ſealed and delivered in the preſence of two witneſſes twelve months before the death of the donor or grantor and inrolled in the Court of Chancery within ſix months after execution; and unleſs ſuch

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(*a*) See *Blaudford* v. *Thackerell*, *ante*, vol. 2. 238.

ſtocks be transferred ſix months before the death of ſuch donor or grantor, and unleſs the ſame be made to take effect in poſſeſſion for the charitable uſe intended immediately, and be without any power of revocation, *&c.*; and alſo ſubject to the proviſion by the ſecond clauſe in favor of purchaſers *bonâ fide* for valuable conſideration.

The third clauſe enacts, that all gifts, grants, conveyances, *&c.* of any lands, tenements, or other hereditaments, or of any eſtate or intereſt therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any ſtock, money, goods, chattels, or other perſonal eſtate, or ſecurities for money, to be laid out or diſpoſed of in the purchaſe of any lands, tenements, or hereditaments, or of any eſtate or intereſt therein, or of any charge or incumbrance affecting or to affect the ſame, to or in truſt for any charitable uſes whatſoever, made in any other manner than by the *Act* is directed, ſhall be abſolutely void.

Upon the third clauſe this queſtion ariſes; whether this is, or is not, a legacy to be applied in the purchaſe of an intereſt in land, or a charge or incumbrance affecting the ſame. I am of opinion, this is directly in words given for that purpoſe. Without all queſtion, unleſs the other argument is reſorted to, it is a direction to apply this money in the purchaſe of that intereſt then affecting thoſe premiſes. But it is ſaid, thoſe premiſes were already appropriated to the ſame uſe, for which this mortgage was to be redeemed; and it is farther inſiſted, that if the teſtator had been himſelf the mortgagee, and had directly given the mortgage by his will to theſe truſtees having the equity of redemption, it is ſomething like beautifying, ſuſtaining, or repairing, buildings, money given to be laid out upon land already veſted in truſtees for a charitable uſe: but I deny that. The land was never given to that charitable purpoſe. This is an intereſt in the land never given to that purpoſe. They had all the eſtate but this mortgage intereſt; and the purpoſe was to give thoſe truſtees, who had the eſtate ſubject to this intereſt, which is in other perſons, a larger and more extenſive intereſt than they had before. I am of opinion, it is within the *Statute*. It is nothing but a ſum of money given for the purpoſe of procuring firſt, and then conveying to the truſtees, this farther, greater, and more extenſive, intereſt

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tereſt than they had before. I ſhould be ſorry to refine upon the *Statute*, or to be more rigorous in the conſtruction than former deciſions warrant: not that I wiſh to defeat the *Statute*: but I wiſh fairly to conſtrue it. The Court has gone ſo far as to hold, that a ſum of money ſecured upon turnpike tolls is an intereſt in land within the *Act* (a). This is not like the caſe of a building. It is very unfortunate, that the teſtator in ſuch a caſe ſhould have taken this method of giving it; for he might

Mortgage of turnpike tolls is within the *Statute* 9 *Geo.* 2. *c.* 36.

(a) *Knapp* v. *Williams*. In *Chancery*, 14th *March* 1798.

The defendants are governors of the charity for the relief of the poor widows and children of clergymen; and they claimed a mortgage for 500*l*. upon the tolls ariſing under acts of parliament 3 *Geo.* 1. 10 *Geo.* 1. *c.* 6. 11 *Geo.* 2. *c.* 6. for the repair of the *Brentford* Turnpike Road. The ſecurity was taken upon the tolls ſimply; not including the toll-houſes and gates.

The queſtion, whether this was within the *Statute* 9 *Geo.* 2. *c.* 36. came on upon exceptions to the Maſter's report.

Solicitor-General and Mr. Richards for the exceptions.—This is certainly not within the miſchief, which is the object of the *Statute*: but an opinion has prevailed, that ſuch intereſts are within the *Act*, on the ground, that the turnpike houſes and conveniencies for levying the tolls are veſted in the Commiſſioners, and made the ſubject of the mortgage. The caſe upon Serjeant *Aſpinall*'s will before the Maſter of the Rolls turned upon that: the houſes being demiſed, the Maſter of the Rolls thought, an ejectment might be brought. This ſecurity is made in a different manner; the Court of King's Bench have determined, that the Commiſſioners cannot delegate their power to erect gates. &c.

Mr. Mansfield and Mr. Alexander for the report.—The Statute reſtrains diſpoſitions of any charge or incumbrance affecting any lands tenements, or hereditaments. This is an incorporeal hereditament. There is no diſtinction between theſe tolls and tolls ariſing from a navigation, a fair, or a market. All tolls, that are private poperty, are rateable to the poor as hereditaments. This point was decided in *Buckeridge* v. *Ingram*, (*ante*, vol. 2. 652.) where ſhares in the navigation of the river *Avon* were held to be real eſtate, and ſubject to dower.

LORD CHANCELLOR.—It occurred to me, that it had been determined, that a mortgage of turnpike tolls is within the *Statute*. The mortgagee would have a right to come into this Court to have an account, and a receiver appointed. He would have a right by the aid of this Court to have the tolls ſpecifically applied to his mortgage. Conſider, what the point of law is, from the nature of the intereſt. It is not at all within the miſchief: but the conſequences would open a much larger field for charitable donations. From the nature of the intereſt created by the *Act* theſe tolls granted in perpetuity are certainly a hereditament: it is in its nature an intereſt affecting land. He might bring an aſſize for theſe tolls, I ſhould think.

There is another ſpecies of toll, which gives no right at all in the land. That is a toll thorough. I think, it falls within the general words of the *Statute**.

The exceptions were overruled.

* In *Hewſe* v. *Chapman*, *poſt*, JAF. bonds of Commiſſioners of a turnpike were held within the *Statute*.

have done it in a more direct way; and I am aware, that all theſe refinements upon the *Statute* are not uſing it for the purpoſe, for which it was intended. If a man deviſes his lands to be ſold, and directs the money to be applied to a charitable uſe, the *Statute* ſays, it is void. I put a caſe, the anſwer to which I expected. It is ſaid, that if the truſtee for a Charity has got any intereſt in land, the increaſing that intereſt or applying money by will to make it good is not an intereſt in land within the *Statute*. I put the caſe of the truſtee having contracted for the purchaſe of an eſtate, and money being left to enable him to complete that purchaſe. The Counſel for the Charity could not ſay, that would not be within the *Statute*. Suppoſe, a part of the money was paid, and part not: if the whole could not be applied, no part could. Where is the difference? Till the mortgage was paid off, the truſtees had not that purchaſe. I am therefore of opinion, that this ſum of money bequeathed to redeem the mortgage upon this Chapel is void by the *Statute*.

Bequeſt of money to enable a truſtee for a Charity to complete a contract for the purchaſe of land is void by the *Statute* 9 G. 2. c. 36.

If I am right upon that point, perhaps the other conſideration is immaterial: but, as the point was made, I will ſay a few words upon it, for the purpoſe of having *The Attorney General* v. *The Biſhop of Oxford*, which has been miſtaken, perfectly underſtood.

It is ſaid, ſuppoſing this legacy is not void by the *Statute*, it is not ſo confined to the purpoſe of paying off the mortgage, as that, in caſe that was paid off without the knowledge of the teſtator, I may not infer an intention, under which it may be applied to other beneficial purpoſes for this ſociety. I confeſs, the inclination of my opinion is otherwiſe. The true queſtion is, can any intention be collected beyond that of ſecuring to them the enjoyment of this building; any intention, that, after having provided for that object, if the whole was not neceſſary for that, the ſurplus ſhould be applied for any other beneficial purpoſe in favor of the ſociety? I am of opinion, no ſuch intention can be collected. I will not ſay, that, if this legacy was not void by the *Statute*, it might not be applied to ſuſtaining and repairing that building: but that it can be applied to any other purpoſe, I deny if *The Attorney General* v. *The Biſhop of Oxford* is right.

The firſt decree in that cauſe was made upon the 13th of *July* 1786; and is in the *Regiſter's Book A.* 1785. The decree by the Lords Commiſſioners in 1792 is in the *Regiſter's Book* 611. The

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teſtator after giving to his executors 100*l*. each for their trouble gave and bequeathed the reſt and reſidue of his perſonal eſtate upon truſt "to build a church at *Wheatley*, where the Chapel now is, in "ſuch manner as I ſhall hereafter direct, or for want of ſuch direction, as my executors ſhall think fit."

The Biſhop of *Oxford*, who was patron and parſon of *Cuddeſden*, in which *Wheatley* was, oppoſed the deſign of building a Church; and it was propoſed by the defendants, that the ſalary of the chaplain ſhould be increaſed. The next of kin inſiſted, that a new Church muſt be built; and that the ſurplus belonged to them. By the firſt decree it was referred to the Maſter to take the accounts; and it was directed, that the defendants, the Biſhop of *Oxford*, &c, do ſignify whether they are willing, that the reſidue of the teſtator's perſonal eſtate ſhall be laid out in building a Church at *Wheatley*, where the Chapel now ſtands; with liberty to lay a plan before the Maſter, how the ſaid reſidue may be moſt beneficially applied according to the will of the teſtator.

Before the cauſe came on again many tranſactions had taken place. The next of kin, and the perſons entitled to the benefit under the will, the pariſhioners acting by the Biſhop and their wardens, came to an agreement, that 3000*l*., part of the reſidue of the teſtator's perſonal eſtate, ſhould be applied for the purpoſe of building a new Church and forming a fund for keeping it in repair, and that 1000*l*., other part thereof, ſhould be applied towards augmenting the miniſter's ſalary; and that 4000*l*. being paid for the purpoſes aforeſaid, the reſidue ſhould belong to the next of kin. This agreement is recited in the decree; and by conſent it was ordered, that the ſum of 4000*l*. being paid for the purpoſes aforeſaid, the reſidue be paid to the next of kin.

This decree is completely deciſive, that, the object not being capable of taking effect, the fund could not be applied to any other charitable purpoſe. The Court could not have made the decree, unleſs they thought, the reſidue was not applicable to any other charitable purpoſe. I will not ſay, it could not have been applied, for repairing or ſuſtaining the Chapel; and I doubt, whether Lord *Kenyon* ſaid ſo: but beyond that purpoſe, or after ſatisfying it, this is deciſive, that it could be applied to no other purpoſe; for if it was applicable to any other general charitable purpoſe or any other purpoſe for the benefit of that pariſh, except of the nature pointed out, that decree could not have been juſtified.

If therefore this legacy was not void upon the *Statute*, I ſhould pauſe upon the queſtion, whether I could apply it to any other purpoſe. I ſee, the teſtator intended it to provide for theſe perſons a place of worſhip. I ſee no other intention; and I think, I could not apply it to increaſe the ſalary of the Miniſters or for any other purpoſe. In looking over theſe caſes, underſtanding, that the queſtion, how far a legacy given to a charitable purpoſe may be applied to any other purpoſe than that ſpecified, is now depending before the Lord *Chancellor* in *The Attorney General* v. *Andrew* (*a*), I find, that in *Moggridge* v. *Thackwell*, (*ante*, vol. i. 469.) Lord *Thurlow* makes this obſervation:

"*Baxter*'s *Caſe* was very ſtrong; and perhaps would not now " be followed. The legacy was deemed to be void, becauſe for " forbidden uſes; and yet the Court thought, that as it was " declared to be for charity, it ſhould go to charities to be " declared by the Court. I do not mean to ſtate that as an autho- " rity; for it is very hard indeed, that the Court ſhould give " it to other Charities, becauſe thoſe, which were mentioned, could " not take (*b*)." 3

I confeſs,

(*a*) *Ante*, vol. 3. 633. See alſo *Attorney General* v. *Bowyer*, *ante*, vol. 3. 714.

(*b*) The decree in *The Attorney General* v. *Baxter*, 1 *Vern.* 248, declaring the legacy for the ejected Miniſters void, and that the legacy ſhould be applied to the maintenance of a chaplain in *Chelſea* College appears to have been reverſed in *The Attorney General* v. *Hughes*, 2 *Vern.* 105, and the validity of the diſpoſition eſtabliſhed: the money appearing to have been ordered to be diſtributed according to the directions of the will.

This ſubject was much diſcuſſed in the caſe of *De Garcin* v. *Lawſon* in *Chancery*, the 3d of *July* 1798.

Ann Fairfax by her will, made in 1784, after giving ſeveral charitable and other legacies, gave the reſidue of her perſonal eſtate to her executors, upon truſt to apply the ſame to ſuch uſes as ſhe ſhould by any codicil appoint; and ſubject thereto to the plaintiff and another perſon, ſhare and ſhare alike.

By a codicil made in 1793 the teſtatrix gave legacies to ſeveral *Roman* Catholic eſtabliſhments in foreign Countries and in this Kingdom: viz. to each Superior for the time being of the *Benedictine* Monks of the South and North Provinces (an eſtabliſhment in this Kingdom): to the *Engliſh* Black Nuns at *Paris*: to the eſtabliſhment of the *Benedictine* Nuns at *Cambray*; to the *Engliſh Benedictine* Monks of —— in *Lorraine*: to *John Bolton* for the maintenance of a *Roman* Catholic miniſter for ever; and ſome others.

Theſe legacies were conſidered as being void: thoſe to the foreign eſtabliſhments being contrary to the policy of this Country, and ſome of them having ceaſed to exiſt; the others being either given to individuals in characters, with reſpect to which they could not claim, or for an illegal eſtabliſhment.

The queſtion aroſe as to the void legacies between the Crown, claiming a right to appoint, the plaintiff and another perſon, claiming under the reſiduary clauſe, and the

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I confeſs, I very much agree with this doctrine.

Declare this legacy of 500*l.* void under the *Statute* 9 *Geo.* 2.

Another point ariſing upon this will is as to the legacies given by the teſtator to the children of his ſiſter *Elizabeth*, or their re-

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next of kin, contending, that the reſiduary diſpoſition was ſpecific and limited, and therefore what was taken out of the ſpecific reſidue for purpoſes, that failed, would belong to them.

In oppoſition to the claim of the Crown it was inſiſted by the *Solicitor General*, Mr. *Owen*, and Mr. *Hall*, that ſuch a claim upon the principle, that the property being given for an improper purpoſe was forfeited, can reſt only upon the *Statute* 1 *Edw.* 6. *c.* 14: but that *Statute* gave to the Crown only diſpoſitions to ſuperſtitious uſes then ſubſiſting; and had nothing in it proſpective. Therefore ſuperſtitious uſes ſince limited are merely void. The opinion, that prevailed in ſome caſes, particularly *Baxter's Caſe*, that the Crown may appoint, was diſapproved by Lord *Thurlow* in *Moggridge* v. *Thackwell* (*ante*, vol. 1. 469); and in *The Attorney General* v. *Whorwood*, 1 *Veſ.* 534. the next of kin upon the foundation of Lord *Hardwicke*'s opinion filed a ſupplemental bill; upon which Lord Keeper *Henley* (a) declared, that the diſpoſition of the perſonal eſtate after the death of Mrs. *Scott*, ſo far as it was intended for a charitable purpoſe, was void; and that it would belong to the next of kin; and under that decree the next of kin upon the death of Mrs. *Scott* about eight years ago obtained a transfer of all the funds. That ſhews, that where the uſe is clearly expreſſed, if it cannot take effect, it is wholly void; and no other uſe can be ſubſtituted. The true caſe, where the diſpoſition is in the Crown, is, where the charitable purpoſe is not ſo clearly expreſſed as to ſhew, what was intended; as in *The Attorney General* v. *Siderſen*, 1 *Ver.* 224. *Attorney General* v. *Hickman*, 2 *Eq. Ca. Ab.* 193. *Attorney General* v. *Herrick*, *Amb.* 712. and *White* v. *White*, 1 *Bro. C. C.* 12. That principle has been followed in *The Attorney General* v. *Whitchurch* (*ante*, vol. 3. 141.) and the other caſes upon the doctrine of *Cy pres.*

(a) The decree was by Lord Hardwicke who did not resign the great seal till 19. Nov.r 1756 ~~Lord Northington~~ ~~[illegible]~~ ~~the~~ final interlocutory decree was made 26. June 1756, & appears to have extended to the real estate, w.ch I understand was about 5 or £600. p.r an.

Kent. The words written X

The Attorney General and Mr. *Campbell* relied on *The King* v. *Lady Portington*, 1 *Salk.* 162; the firſt decree in *Baxter's Caſe*, 1 *Vern.* 248; and *De Coſta* v. *De Pas*, *Amb.* 228; as affording a principle in ſupport of the right of the Crown beyond that of *Cy pres.*

X respect were the co.t declared that the regulations referred to in the testator's codicil dated 20. Dec. 1735. & consequently the trusts whereupon the testator's real estate & the surplus of his personal estate were directed to be given to the respective colleges in being void, the devise of the real estate was a resulting [illegible] [illegible] [illegible] [illegible]

The Lord Chancellor ſaid, he had always thought, that, where the diſpoſition was to a ſuperſtitious uſe, the Crown appointed; but that he ſhould conſider it a few days.

This cauſe is ſtill depending for judgment: but there is not much proſpect of a deciſion; as during the argument it appeared very doubtful, whether there would be any fund for the charitable legacies; a great part of the perſonal eſtate being ſecured upon mortgage; and the reſt not being ſufficient for the diſcharge of the debts, nor equal to the legacies, to which there was no objection. It was alſo ſuggeſted, that ſome of the legacies under the codicil, claimed by the reſiduary legatees as being void, had been paid with their conſent by the executors.

In the courſe of the argument it was obſerved, that the diſpoſition in *Baxter's Caſe* was eſtabliſhed by the reverſal of the firſt decree: the *Toleration Act* having paſſed in the interval; and there being nothing illegal in the object; which was not to eſtabliſh any thing ſuperſtitious, but merely to provide for a number of perſons in diſtreſs; and the application was to be perſonally by Mr. *Baxter* himſelf.

The right of the Crown therefore certainly appears not to be affected by the final deciſion of that caſe. The exerciſe of that right by the firſt decree and in the caſe of *De Coſta* v. *De Pas*, *Amb.* 228. cannot well reſt upon the principle of *Cy pres.* Suppoſing forfeiture to be the principle, the right of the Crown, if it exiſts independent of the *Statute* of *Edward* the Sixth, may perhaps have its ſource in the early *Statutes* of *Mortmain*; under which a forfeiture accrues to the lord, and ultimately to the King. It is remarkable, that the *Statutes* 23 *Hen.* 8. *c.* 10. and 9 *Geo.* 2. 36. contain no clauſe of that nature; but ſimply declare the diſpoſition void.

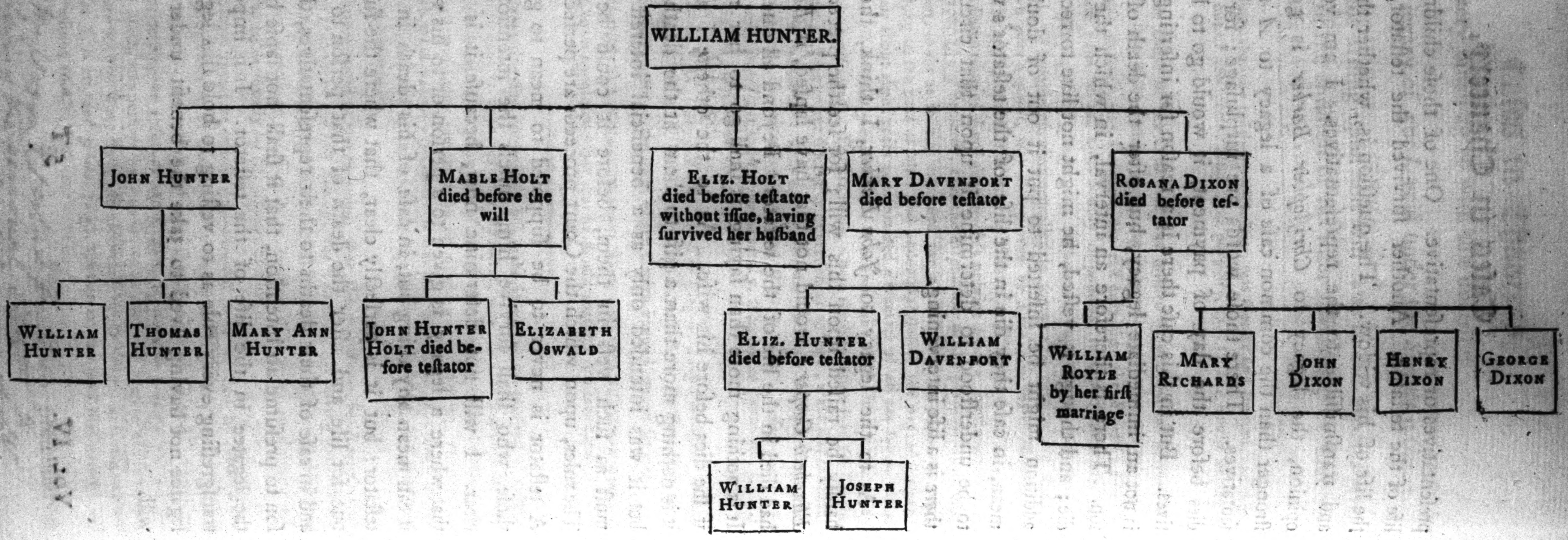
X "the bequest of the personal estate &c. Then words follow declaring the personal estate to belong to the next of kin. Ex relatione of Mr. Ryder ~~[illegible]~~ whose uncle was solicitor in the cause & read to me the words of the decree. I see now my mss. addit. in 1. Ves. 537 where the words may be supplied [illegible] [illegible] preſentatives or repreſentative. One of thoſe children died in the life of the teſtator. Another ſurvived the teſtator, but died in the life of his widow. The queſtion is, whether they are veſted, and tranſmiſſible to the repreſentatives. I am very clearly of opinion, the legacy to *Chriſtopher Barker* is good. This is ſtronger than the common caſe of a legacy to *A* and his repreſentatives. There thoſe words are ſurpluſage; for if the legatee dies before the day of payment, it would go to his repreſentatives. But in this caſe there is a reaſon for inſerting them. This is not an immediate legacy, but after the death of another perſon. There is therefore an interval, in which the legatee might die; and though it veſted, he might not live to receive it. That addition might be inſerted to put it out of doubt; and muſt mean, in caſe they die in the life of the teſtator's wife. I deſire + 3 to be underſtood to determine it upon that circumſtance, that there is a life intervening.

As to the legacy to *John Barker*, I think, the queſtion can hardly be raiſed upon this will; for ſee the preceding legacy to *Elizabeth Cooper*: would not that have lapſed, if *Elizabeth Cooper* had died in the life of the teſtator? Beyond all queſtion it would. It is nothing more than ſaying, it ſhall go to her repreſentatives, if ſhe dies before his wife. As to the others, I am of opinion, it is nothing more than a gift to them at the death of his wife; but it was intended only as a beneficial intereſt to them; and muſt as ſuch veſt in them, before it could be tranſmiſſible. The rules, upon which the Court proceeds are perfectly eſtabliſhed. A teſtator is never to be ſuppoſed to mean to give to any but thoſe, who ſhall ſurvive him, unleſs the intention is perfectly clear. I will not determine now, becauſe it is not neceſſary, that where a legacy is given to a perſon or to his repreſentatives, it can mean any thing but, in caſe of his death in the life of the teſtator: but it is perfectly clear, that where the fund is given to one for life and after the death of that perſon to ſeveral others, and in caſe of their deaths to their repreſentatives, there is no reaſon to preſume an intention, that it ſhall not lapſe by the death of the legatee in the life of the teſtator. It is impoſſible without tranſgreſſing every rule as to veſting to hold this legacy veſted, the legatee not having lived to take the benefit under the teſtator's will.

To prevent a lapſe the intention muſt be perfectly clear.

ROYLE *v.* HAMILTON.

PEDIGREE.


WILLIAM HUNTER.
John Hunter
Mable Holt died before the will
Eliz. Holt died before teſtator without iſſue, having ſurvived her huſband
Mary Davenport died before teſtator
Rosana Dixon died before teſtator
William Hunter
Thomas Hunter
Mary Ann Hunter
John Hunter Holt died before teſtator
Elizabeth Oswald
Eliz. Hunter died before teſtator
William Davenport
William Royle by her firſt marriage
Mary Richards
John Dixon
Henry Dixon
George Dixon
William Hunter
Joseph Hunter

ROYLE *v.* HAMILTON.

Rolls.
Feb. 18th.

Grandchildren entitled under the deſcription of "*children*" in a will: the intention upon the whole clauſe being children, or the iſſue of thoſe, who ſhould be dead.

Diſtribution *per ſtirpes* & *per capita*.

John Hunter by his will, dated the 18th of *July* 1796, after ſeveral pecuniary and ſpecific legacies gave and bequeathed as follows:

"I give unto the children of *William Hunter* Eſq., late of "*Hampton* in *Virginia*; that is to ſay, to Captain *John Hunter* of "*Hampton* in *Virginia*, 2000 *l.* and to his iſſue: to his ſiſters, or "their iſſue, 1000 *l.* each; (viz.) the iſſue of his ſiſter *Mable* "deceaſed; Mrs. *Elizabeth Holt*, wife of *John Holt* Eſq., now of "*New York*: if Mr. *Holt* ſhould ſurvive her, I will, that he have "the intereſt of that ſhare for life; at his death, to the ſurviving "children of the ſaid *William Hunter*: Mrs. *Mary Davenport*, "wife to the Rev. Mr. *Davenport* in *Virginia*, and to Mrs. *Roſana Dixſon*, wife to Mr. *Dixon*, printer in *Virginia*: the whole "ſum to the ſaid Captain *John Hunter* and his iſſue and to his "ſiſters and their iſſue amounting to 6000 *l.*: if any lapſe, to be "divided among the ſurvivors."

The teſtator died in *April* 1791.

Mable, the wife of *David Holt*, died before the date of the will; leaving iſſue one ſon, *John Hunter Holt*, who alſo died in the life of the teſtator, viz. in *April* 1788, and one daughter, *Elizabeth Oſwald*.

Elizabeth Holt died without iſſue in *March* 1788, having ſurvived her huſband *John Holt*; who died in 1783.

Elizabeth Hunter Davenport, the only daughter of *Mary Davenport*, married *William Hunter*, and died in the life of her mother, viz. in 1782, leaving iſſue *William Hunter* and *Joſeph Hunter*.

Mary Davenport died in *March* 1788; leaving *William Davenport* her only ſurviving child.

Roſana Dixon died in *March* 1789; leaving iſſue by her firſt marriage *William Royle*, and by her ſecond marriage *Mary*, wife of *John Richards*, *John Dixon*, *Henry Dixon*, and *George Dixon*.

The bill was filed by the children of *Roſana Dixon*, claiming the legacy of 1000*l.*, given by the will to *Roſana Dixon* or her iſſue, and one fourth part of the legacy of 1000*l.* given to *Elizabeth Holt* or her iſſue.

The executors by their anſwer admitted, that they paid 2250*l.*, part of the ſum of 6000*l.* mentioned in the will, to *John Hunter* the elder, in reſpect of the legacy to him of 2000*l.* and his fourth part of the legacy of 1000*l.* to *Elizabeth Holt*; and the ſum of 1250*l.*, other part thereof, to *Eleazer Oſwald* and *Elizabeth*, his wife, for her legacy of 1000*l.* and her ſhare of the ſaid lapſed legacy; and to the defendant *William Davenport* the ſum of 51*l.* 9*s.* 1*d.*, in part of the legacy, which they conceived he was entitled to, as the only ſurviving iſſue of Mrs. *Davenport*; and that they had alſo advanced, to the plaintiff *Royle* a part of the legacy, to which they conceived him to be entitled.

The defendants *William Hunter*, *Thomas Hunter*, and *Mary Ann Hunter*, inſiſted by their anſwer, that as the iſſue of *John Hunter* they were equally entitled with their father; or he was entitled to the intereſt for his life; and that the money ought to be ſecured for their benefit.

By the decree pronounced by the Maſter of the Rolls on the 21ſt of *July* 1797 various inquiries were directed, with a view to aſcertain the claims of the parties.

The cauſe came on for farther directions; at which time Captain *John Hunter* was dead.

For the executors it was contended, that the legacy of *Elizabeth Holt* ſhould be divided *per ſtirpes* as to the ſtocks: *viz.* that Captain *John Hunter*, and his ſiſters, if they had been living at the deceaſe of the teſtator, would have been entitled in equal ſhares; and that the ſhare, that would have belonged to each ſiſter, if living, ſhould go to their reſpective iſſues *per capita* among themſelves; and that the paymens, that had been made, were good; and the children of Captain *John*

Hunter have no intereſt: the word "*children*" never being extended to grandchildren, whoſe parents are living.

Maſter of the Rolls.—Upon the beſt conſtruction, that I can put upon this blind clauſe, it is clear, that, when the teſtator ſpeaks of the children of *William Hunter*, explaining that afterwards to mean them and their iſſue, he meant, that, if any of them ſhould be dead, their children are *perſonæ deſignatæ* to ſtand in their place. The word "*children*" certainly would not mean grandchildren, unleſs the parent of thoſe grandchildren, who is the object of that deſcription, is dead: but it is plain, he meant to embrace iſſue beyond the firſt generation. It is ſaid, that, where he mentions the ſurviving children of *William Hunter*, he muſt mean children ſtrictly: but upon the latter part of the clauſe it is perfectly plain, he meant juſt what he did before:

"The whole ſum to the ſaid Captain *John Hunter* and his iſſue "and to his ſiſters and their iſſue amounting to ſix thouſand pounds: "if any lapſe, to be divided among the ſurvivors:"

The ſurvivors of whom? Of all thoſe perſons, to whom he had given it. By "*children*" he means the deſcendants. Where he ſpeaks of ſurviving children, he means children, as he meant before. The other conſtruction would involve this abſurdity; that, if none of the children had ſurvived Mrs. *Holt*, he would have died inteſtate; a conſtruction the Court always endeavours to avoid.

I found myſelf upon theſe words: "the whole ſum to the ſaid "Captain *John Hunter* and his iſſue and to his ſiſters and their iſſue," &c.

By the decree it was declared, that one fourth part of the legacy given to *Elizabeth Holt* belonged to the plaintiffs according to the prayer of the bill (*a*).

(*a*) See *Davenport* v. *Hanbury*, *ante*, vol. 3. 257.

1799.
Feb. 26th, *March* 1ſt, 2d, 5th.

Lady CLINTON *v.* Lord ROBERT SEYMOUR.

Maſter of the Rolls for the Lord Chancellor.

The Court leans againſt the conſtruction for raiſing portions or maintenance out of a reverſionary term; and upon that principle, when the term fell into poſſeſſion, and the portion was raiſed, refuſed to charge the difference between the ſum annually allowed by the infant's grandfather for her maintenance and the ſum charged.

Appointment, by father and ſon under a power, of money charged on an eſtate; that in caſe the ſon ſhould ſurvive, it ſhould be applied by him in and towards payment of the debts of the father; and ſubject thereto the reſidue, if any, ſhould go and be conſidered as part of the perſonal eſtate of the father; and in caſe the father ſhould ſurvive, it ſhould go and be paid by him, his executors, &c. in and towards ſatisfaction of his debts, with a ſimilar proviſion as to the reſidue: the father ſurviving appointed in favor of another ſon, for valuable conſideration as to part: as to that the decree directed payment under the appointment: the reſidue to be paid into Court, with liberty to apply; in caſe of no application within twelve months to be paid according to the appointment.

A decree cannot be impeached collaterally in another cauſe.

BY the ſettlement made upon the marriage of *Henry*, late Duke of *Newcaſtle*, then Earl of *Lincoln*, and *Catherine Pelham*, dated the 13th of *October* 1744, the Duke conveyed ſeveral eſtates in *Bedford Level* and in the county of *Surrey* to the uſe of himſelf for life; remainder to truſtees to preſerve contingent remainders; remainder to truſtees, their executors, &c. for a term of 500 years; remainder to the firſt and other ſons of the marriage in tail male.

The truſts of the term of 500 years were declared to be, that in caſe there ſhould be an eldeſt or only ſon of the marriage, who ſhould for the time being after the death of the ſaid Duke be entitled to the immediate freehold of the premiſes by virtue of the ſaid limitations, and alſo one or more other child or children, then that the truſtees ſhould after the death of the ſaid Duke, or in his lifetime by his direction, by ſale or mortgage or by the rents and profits raiſe ſuch ſums of money for the portions of all and every the child and children, other than ſuch eldeſt or only ſon, as after mentioned: that is to ſay, in caſe there ſhould be but one ſuch child, ſuch only child ſhould have 10,000 *l.* for his or her portion; and in caſe there ſhould be two ſuch children, ſuch two children ſhould have 15,000 *l.*; and in caſe there ſhould be three or more children, they ſhould have 20,000 *l.*: the ſaid 15,000 *l.* and 20,000 *l.* to be paid to them reſpectively in ſuch ſhares and proportions, as the ſaid Duke of *Newcaſtle* and *Catherine Pelham* or the ſurvivor ſhould by any deed or writing executed in the preſence of two witneſſes appoint; and in default of ſuch appointment to be equally divided among them, ſhare and ſhare alike; and it was provided, that if any of the younger ſons ſhould die under the age of twenty-one years, or become an eldeſt or only ſon, before his portion ſhould be payable, or if any of the daughters ſhould die under the age of twenty-one and unmarried, as well the original portion or portions of him, her, or them, ſo dying or becoming an eldeſt or only ſon as any ſhare or ſhares accruing by way of ſurvivorſhip, ſhould from time to time, as the ſame ſhould ſo happen, go to the ſurvivors or ſurvivor, to be paid at ſuch time and in ſuch manner as the original portions; ſo as that in caſe there ſhould be but two ſuch ſurviving children, they ſhould have no more than 15,000 *l.* for their portions, and in caſe there ſhould be but one ſuch child, he or ſhe ſhould have no more than 10,000 *l.* for his or her portion, by virtue of the truſts of the ſaid term.

The iſſue of this marriage was three ſons only: *Henry*, Earl of *Lincoln*; Lord *Thomas Pelham Clinton*; and Lord *John Pelham Clinton*.

Catherine, Ducheſs of *Newcaſtle*, died without leaving any other child. *Henry*, late Duke of *Newcaſtle*, ſucceeded to that title in 1768.

Under an act of parliament, 29th *Geo.* 2, the ſaid fen eſtate, called *Bedford Level*, was ſold; and the ſum of 70,000 *l.* being the reſidue of the purchaſe-money after paying off a mortgage, was laid out in the purchaſe of eſtates in the counties of *Nottingham* and *Lincoln*; which by indentures of leaſe and releaſe, dated the 8th and 9th of *May* 1772, were conveyed to the uſe of *Henry*, Duke of *Newcaſtle* for life; remainder to truſtees to preſerve contingent remainders; remainder to truſtees their executors, *&c*, for a term of 500 years; remainder to the uſe of *Henry*, Earl of *Lincoln*, and the heirs male of his body; with ſimilar remainders to Lord *Thomas Pelham Clinton* and Lord *John Pelham Clinton*; remainder to the right heirs of the Duke of *Newcaſtle* for ever.

The truſts of the term of 500 years were declared to be, that the truſtees ſhould after the death of the Duke of *Newcaſtle*, or in his life, if he ſhould ſo direct, by ſale or mortgage or by the rents and profits raiſe the ſum of 15,000 *l.* for the portions of Lord *Thomas Pelham Clinton* and Lord *John Pelham Clinton*; to be paid to them reſpectively in ſuch ſhares and proportions as *Henry*, Duke of *Newcaſtle*, ſhould by any deed or writing, executed in the preſence of two witneſſes, appoint; and in default of ſuch appointment, to be equally divided between them, ſhare and ſhare alike; and it was provided, that, if either of them ſhould die under the age of twenty-one years, or become an eldeſt or only ſon, and entitled to the freehold of the ſame premiſes under the limitations of the ſame indenture of ſettlement, before his portion ſhould be payable, the ſurvivor of them ſhould have no more than 10,000 *l.* for his portion by virtue of the truſts of the ſaid term.

Henry, Earl of *Lincoln*, having attained the age of twenty-one, in 1772 in conſideration of the Duke of *Newcaſtle*'s having agreed to ſettle his manſion-houſe at *Clumber*, upon which he had expended upwards of 70,000 *l.*, and other eſtates, for the benefit of the Earl of *Lincoln* and his iſſue male after the deceaſe of the Duke, for the reſidence and the farther ſupport of the honors and dignity of the family, joined the Duke iu ſuffering recoveries of the ſaid eſtate; and by indentures of leaſe and releaſe, dated the 13th and 14th of *May* 1772, the recoveries were declared to enure, as to the eſtates purchaſed with the ſaid ſum of 70,000 *l.*, ſubject to the ſaid terms of years and the powers for raiſing the ſaid ſum of 15,000 *l.* for younger children's portions, to the uſe of the Duke of *Newcaſtle* for life; remainder to truſtees to preſerve contingent remainders; remainder to the Earl of *Lincoln* for life; remainder to his firſt and other ſons in tail male; remainder to the Duke of *Newcaſtle* in fee; with a power to the Duke of *Newcaſtle* and the Earl of *Lincoln* jointly to revoke the uſes.

By indentures of leaſe and releaſe, previous to the marriage of *Henry*, Earl of *Lincoln*, and Lady *Frances Seymour*, dated the 19th and 20th of *May* 1775, reciting indentures of leaſe and releaſe, dated the 13th and 14th of *May* 1772, declaring the uſes of recoveries, that had been ſuffered, of ſeveral real eſtates in the counties of *Nottingham*, *Middleſex*, *York*, *Surrey*, and *Lincoln*, it was witneſſed, that in conſideration of the intended marriage and for other conſiderations *Henry*, Duke of *Newcaſtle*, and *Henry*, Earl of *Lincoln*, in purſuance of the power given by the ſaid indentures revoked the uſes thereof; and conveyed to truſtees and their heirs all the ſaid eſtates, to hold to them and their heirs to the ſeveral uſes, intents, and purpoſes, after mentioned: that is to ſay; immediately after the marriage, as to certain premiſes in the counties of *Nottingham* and *Lincoln* to the uſe of the Duke of *Newcaſtle*, his heirs and aſſigns for ever; and as to all other the ſaid real eſtates, ſubject to a term of 99 years and a term of 200 years, the truſts whereof are ſince determined, to the intent, that the Counteſs of *Lincoln*, in caſe ſhe ſhould ſurvive the Earl of *Lincoln*,

Lincoln, might receive an annual ſum of 3000*l.* for her life, for her jointure and in bar of dower; remainder to the uſe of truſtees for a term of 800 years for ſecuring that rent-charge; remainder to *Henry*, Duke of *Newcaſtle*, and his aſſigns for life without impeachment of waſte; remainder to truſtees to preſerve contingent remainders; remainder to truſtees for a term of 1000 years for ſecuring portions for daughters and younger ſons of the ſaid marriage, as after mentioned; remainder to *Henry*, Earl of *Lincoln*, and his aſſigns for life without impeachment of waſte; remainder to truſtees to preſerve contingent remainders; remainder to the firſt and other ſons of *Henry*, Earl of *Lincoln*, and *Frances*, Counteſs of *Lincoln*, in tail male; remainder to Lord *Thomas Pelham Clinton* for life, and to his firſt and other ſons in tail male, and to Lord *John Pelham Clinton* and his firſt and other ſons, ſucceſſively in the ſame manner; remainder to the uſe of the daughters of the Earl of *Lincoln* ſucceſſively in tail; with divers remainders over, and the ultimate remainder to the right heirs of *Henry*, Duke of *Newcaſtle*.

The truſts of the term of 1000 years were declared to be, in the ſeveral events of there being a child or children of the marriage, an eldeſt ſon and other children, or if there ſhould be no ſon, or there being a ſon, he ſhould die under the age of twenty-one years without leaving any iſſue male of his body, and there ſhould be one or more daughter or daughters, then that the ſaid truſtees ſhould, after the death of the ſurvivor of *Henry*, Duke of *Newcaſtle*, and *Henry*, Earl of *Lincoln*, or during their joint lives, if they ſhould jointly ſo direct by any deed or writing, to be executed by them, as therein mentioned, or in the lifetime of the ſaid *Henry*, Earl of *Lincoln*, after the deceaſe of the ſaid Duke of *Newcaſtle*, in caſe the Earl of *Lincoln* ſhould ſurvive the Duke, and ſhould ſo direct, as therein mentioned, by mortgage or ſale or other diſpoſition of all or any part of the ſaid hereditaments and premiſes compriſed in the ſaid term of 1000 years, or by or out of the rents, iſſues and profits, thereof, or by any other ways and means, levy and raiſe ſuch monies for the portion and portions of ſuch child and children, as therein mentioned: that is to ſay; in the event of there being an only daughter of the ſaid marriage, and no ſon, who ſhould become actually entitled, as therein mentioned, the ſum of 15,000*l.* for the portion of ſuch only daughter, to be paid to her at ſuch days and times as the

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ſaid Earl of *Lincoln* ſhould by any writing, to be executed as therein mentioned, or by his laſt will, appoint; and in default of ſuch appointment, to be paid to her at her age of twenty-one years, or day of marriage, which would first happen after the death of the ſurvivor of the ſaid *Henry*, Duke of *Newcaſtle*, and *Henry*, Earl of *Lincoln*; and in the event of there being two or more younger children or daughters, to raiſe ſuch ſums of money, and payable in ſuch manner, as therein is mentioned; and it was declared, that, in caſe of default of direction or appointment of the ſaid portions, if it ſhould happen, that any ſuch child, being a ſon, ſhould attain his age of twenty-one years, or, being a daughter, ſhould attain her age of twenty-one years, or be married, in the lifetime of the ſurvivor of the ſaid Duke of *Newcaſtle* and Earl of *Lincoln*, then and from thenceforth ſuch portion ſhould be conſidered as a veſted intereſt; but the payment thereof ſhould be poſtponed until the end of ſix calendar months next after the death of the ſurvivor of the ſaid Duke of *Newcaſtle*, and Earl of *Lincoln*; and then the ſaid portion ſhould be paid and payable with intereſt for the ſame at the rate of 4*l.* *per cent. per annum* from the time of the deceaſe of the ſurvivor of the ſaid Duke of *Newcaſtle* and Earl of *Lincoln*, unleſs ſuch portion ſhould be raiſed and paid during the joint lives of the ſaid Duke of *Newcaſtle* and Earl of *Lincoln* or during the life of the ſurvivor of them; which it ſhould be lawful for the truſtees for the time being to levy and raiſe during the joint lives of the ſaid Duke of *Newcaſtle* and Earl of *Lincoln*, or during the life of the ſurvivor of them, if they ſhould ſo direct, by deed or writing, executed as therein mentioned; and it was provided, that no ſale or mortgage of any part of the hereditaments limited to the truſtees for the ſaid term of 1000 years ſhould be made, until ſome one of the portions thereby provided ſhould become payable, except for the raiſing ſuch part or parts of the portions thereby intended for any younger ſon or ſons, as it might be thought proper to levy and raiſe for the placing out in the world or providing employments for, or otherwiſe for the preferment of or advancing, any ſuch younger ſon or ſons, purſuant to a power for that purpoſe therein given to Lord *Lincoln* by any deed or writing, if he ſhould think fit, to order 5000*l.* to be raiſed for putting out or placing in the world any younger ſon, notwithſtanding his portion ſhould not have become payable: and upon farther truſt, after the deceaſe of the ſaid Earl of *Lincoln* to levy and raiſe by all or any of the means and ways aforeſaid for the maintenance and education of all and every the child and children of the ſaid marriage, for whom portions were thereby intended to be provided, as aforeſaid, in the mean time, until his, her, or their, reſpective portions ſhould become payable, ſuch yearly ſum and ſums of money, not exceeding the intereſt of ſuch portions, as the ſaid Earl of *Lincoln* ſhould by deed or will to be executed and atteſted, as therein mentioned, direct or appoint; or, in default of ſuch direction or appointment, then ſuch yearly ſum or ſums of money as would be equivalent to what the intereſt of the reſpective portions thereby intended for ſuch child and children (were he, ſhe, or they, then entitled thereto) would then amount to, at the rate of 4 *l. per cent. per annum;* the ſaid yearly ſums for maintenance to be paid quarterly on the four uſual feaſt days in the year: the firſt payment thereof to be made on ſuch of the ſaid feaſt days as ſhould firſt happen after the deceaſe of the ſaid Earl of *Lincoln;* and it was declared, that after the aforeſaid maintenance, or ſuch ſeveral ſums as the ſaid Earl of *Lincoln* ſhould ſo think fit to direct or appoint for the maintenance of ſuch younger children, as aforeſaid, ſhould be raiſed and paid, the reſidue and overplus of the rents and profits of the ſaid premiſes, if any, ſhould, until the ſaid portions ſhould become payable or come to be raiſed, as aforeſaid, be had and received by the perſon or perſons, who for the time being ſhould be entitled to the reverſion or remainder of the ſaid premiſes expectant on the determination of the ſaid term of 1000 years for his, her, and their, own uſe and benefit; and it was provided, that there ſhould not be raiſed for the portion of any one child by reaſon of ſurvivorſhip or upon any other account any ſum or ſums of money, that would in the whole exceed the principal ſum of 15,000*l.*

The ſettlement contained a proviſo, that it ſhould be lawful for the ſaid *Henry*, Duke of *Newcaſtle*, and *Henry*, Earl of *Lincoln*, by deed or writing, to be executed by them in the preſence of two witneſſes, to charge all or any part of the ſaid eſtates with any ſum or ſums of money not exceeding in the whole the ſum of 30,000*l.*, with intereſt to be paid to ſuch perſon or perſons, and for ſuch intents and purpoſes as the ſaid Duke of *Newcaſtle* and Earl of *Lincoln* ſhould think fit; or otherwiſe to borrow and take up any ſum or ſums of money, not exceeding the ſum of 30,000*l.;* and, to ſecure the ſame, to mortgage all or any part of the premiſes for any term of years without impeachment of waſte, ſubject to redemption.

A power was inſerted for the truſtees with the conſent of the Duke of *Newcaſtle* and the Earl and Counteſs of *Lincoln* to ſell all or any part of the ſettled eſtates, and to inveſt the money produced by the ſale in the purchaſe of other eſtates to be ſettled to the ſame uſes, or as near thereto as the deaths of parties and other contingencies would admit; and in the mean time to lay out the money in government or real ſecurities, and to apply the intereſt and dividends in ſuch manner as the rents and profits of the lands to be purchaſed, in caſe ſuch purchaſes were made.

The iſſue of this marriage was one ſon, Lord *Clinton*, and one daughter, Lady *Catherine Pelham Clinton*.

By deed poll, dated the 14th of *September* 1778, the Duke of *Newcaſtle* and the Earl of *Lincoln* in purſuance of the power in the indentures of *May* 1775, and in conſideration of the ſum of 14,000 *l.* paid to them by *Richard Henry Alexander Bennett*, charged all the eſtates in the county of *Nottingham* with payment of the ſaid 14,000 *l.* and intereſt; and for better ſecuring the ſame granted the premiſes ſo charged to *Bennett*, to hold to him, his executors, &c. for a term of 500 years; and in farther execution of their power the Duke of *Newcaſtle* and the Earl of *Lincoln* charged all the ſaid eſtates compriſed in the ſaid ſettlement with and for the raiſing and paying to them, their executors, adminiſtrators or aſſigns, the full ſum of 16,000 *l.*, with intereſt at the rate of 5 *per cent.* from the date of the ſaid indenture until the ſaid 16,000 *l.* ſhould be raiſed and paid.

By another deed poll, of the ſame date, it was covenanted, declared, and agreed, by and between the Duke of *Newcaſtle* and the Earl of *Lincoln*, that the ſaid ſum of 16,000 *l.*, when raiſed purſuant to the laſt-mentioned deed poll, ſhould, in caſe the Earl of *Lincoln* ſhould happen to ſurvive the Duke of *Newcaſtle*, go and be paid, applied, and diſpoſed of, by the ſaid Earl of *Lincoln*, his executors or adminiſtrators, in and towards payment of the debts of the ſaid Duke of *Newcaſtle*; and, ſubject thereto, the reſidue of the ſaid ſum of 16,000 *l.* and intereſt, if any, ſhould go and be conſidered as part of the perſonal eſtate of the ſaid

Henry, Duke of *Newcaſtle*; and in caſe the ſaid Duke of *Newcaſtle* ſhould happen to ſurvive the ſaid Earl of *Lincoln*, that then the ſaid 16,000*l.* and intereſt ſhould go and be paid by the ſaid Duke, his executors or adminiſtrators, in and towards ſatisfaction of the debts of him, the ſaid Duke of *Newcaſtle*; and, ſubject to the payment of ſuch debts, then that the reſidue of the ſaid 16,000*l.* and intereſt, if any, ſhould go and be conſidered as part of the perſonal eſtate of the ſaid *Henry*, Duke of *Newcaſtle*.

Henry, Earl of *Lincoln*, died inteſtate upon the 18th of *October* 1778; leaving the Counteſs of *Lincoln*, Lord *Clinton*, and Lady *Catherine Pelham Clinton*, ſurviving. Lord *Clinton* died upon the 16th of *September* 1779, an infant under the age of two years. The Duke of *Newcaſtle* and the Earl of *Lincoln* had not executed any joint appointment of the time, when the portions ſhould be payable: nor had Lord *Lincoln* executed any appointment of a yearly ſum of money for maintenance and education: but the Duke of *Newcaſtle* after the death of his ſon the Earl of *Lincoln* paid to the Counteſs Dowager of *Lincoln* the yearly ſum of 400*l.* for the maintenance and education of her daughter; and no other ſum was paid by the Duke in reſpect of intereſt of her portion of 15,000*l.* under the ſettlement of 1775.

The Duke of *Newcaſtle* made no appointment during the lives of Lord *Lincoln* and his ſon as to the portions of Lord *Thomas Pelham Clinton* and Lord *John Pelham Clinton*.

By indenture, dated the 6th of *September* 1779, *Henry*, Duke of *Newcaſtle*, under the truſt term of 500 years in the ſettlement of 1744 and the *Act* of Parliament, 29 *Geo.* 2. appointed, that 5000*l.*, part of the ſum of 15,000*l.* therein mentioned, ſhould be raiſed and paid for the uſe and benefit of Lord *John Pelham Clinton*; which ſum was raiſed by a mortgage of the term, and paid accordingly.

By a decree, made on the 10th of *March* 1780, upon the bill of the Duke of *Newcaſtle* and Lord *Thomas Pelham Clinton* againſt the truſtees of the term under the ſettlement of 1744 and the *Act* of Parliament it was decreed, that the ſum of 10,000*l.*, the remainder of the ſaid ſum of 15,000*l.*, ſhould be raiſed by ſale

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or mortgage of the premiſes compriſed in the term of 500 years and be paid into the Bank; and in *May* following that ſum was raiſed by mortgage, and paid in accordingly.

By deed poll, dated the 6th of *May* 1780, the Duke of *Newcaſtle* directed and appointed, that 100*l.*, part of the ſaid ſum of 10,000*l.*, ſhould be paid to Lord *Thomas Pelham Clinton*; and that 9,900*l.*, the reſidue thereof, ſhould be paid to Lord *John Pelham Clinton*.

By an order made in the Cauſe upon the joint petition of Lord *Thomas Pelham Clinton* and Lord *John Pelham Clinton* thoſe ſums of 100*l.* and 9,900*l.* were paid according to the deed of appointment of the 6th of *May* 1780.

By indentures, dated the 12th of *May* 1780, reciting, that *Henry*, Duke of *Newcaſtle*, was then become entitled to the ſaid ſum of 16,000*l.*, the reſidue of the ſum of 30,000*l.* charged upon the eſtates compriſed in the ſettlement of 1775, and all the right and intereſt therein, charged upon the ſaid eſtates and premiſes, it is witneſſed, that in conſideration of the ſum of 14,900*l.* to the Duke of *Newcaſtle* then paid by Lord *John Pelham Clinton*, and of the love and affection, which the Duke bore his ſaid ſon, the Duke aſſigned to Lord *John Pelham Clinton*, his executors, adminiſtrators, and aſſigns, the ſaid ſum of 16,000*l.* and all his right, title, and intereſt, therein and thereto either at Law or in Equity; to have, receive, and take, the ſame to and for the ſole and abſolute uſe and benefit of the ſaid Lord *John Pelham Clinton*, his executors, adminiſtrators, and aſſigns, for ever, in as full, ample, and beneficial, manner to all intents and purpoſes as he, the ſaid Duke, might or could have had and enjoyed the ſame, in caſe this indenture had not been made; and the Duke for more effectually ſecuring the payment of the ſaid 16,000*l.* to Lord *John Pelham Clinton*, his executors, *&c*, empowered him and them to uſe all ſuch means, as he and they ſhould be adviſed, for raiſing the ſaid ſum, and to make uſe of the name of the ſaid Duke, his executors or adminiſtrators, if neceſſary for that purpoſe; and the Duke by a receipt indorſed upon the ſaid indenture acknowledged to have received of Lord *John Pelham Clinton* the ſaid ſum of 14,900*l.*, the conſideration money.

Lord *John Pelham Clinton* by his will, dated the 27th of *September* 1781, after directing, that his debts ſhould be immediately paid out of the 16,000*l.*, which he was poſſeſſed of as a younger brother's fortune, and giving a legacy of 200*l.*, to be paid out of the ſaid 16,000*l.* gave to his niece *Catherine Pelham Clinton* all the reſt, reſidue, and remainder, of his perſonal eſtate and effects of what nature or kind ſoever and whereſoever; and he ordered, that his ſaid niece ſhould not receive any uſe or benefit from that his legacy until the day of her marriage, or when ſhe had attained the age of twenty-one years; and at either of thoſe periods he ordered that ſhe ſhould receive the whole value from his death of that his legacy.

Lord *John Pelham Clinton* died ſoon after the execution of his will.

Henry, Duke of *Newcaſtle*, died upon the 22d of *February* 1794; leaving Lord *Thomas Pelham Clinton*, his only ſon ſurviving; who became Duke of *Newcaſtle*.

Thomas, Duke of *Newcaſtle*, entered upon the ſettled eſtates, and continued in poſſeſſion till his death upon the 18th of *May* 1795; leaving *Henry Pelham Pelham Clinton*, Duke of *Newcaſtle*, his eldeſt ſon and heir at law.

The intereſt of the ſum of 16,000*l.* was paid by *Henry*, Duke of *Newcaſtle*, and his executors to the executors of Lord *John Pelham Clinton*; which having been laid out from time to time, with the accumulated dividends, produced the ſum of 11,100*l.* 3 *per cent.* Conſolidated Bank Annuities.

Lady *Catherine Pelham Clinton*, having attained the age of twenty-one years upon the 6th of *April* 1797, filed the bill; praying, that the defendants *Frances*, Counteſs of *Lincoln*, and *Martin Whiſh*, the executors of Lord *John Pelham Clinton*, may be decreed to transfer to the plaintiff the ſaid 11,100*l.* Bank Annuities, and to pay 42*l.* 2*s.* 8*d.*, a balance of caſh in their hands, being the clear reſidue of the perſonal eſtate of Lord *John Pelham Clinton*; that an account may be taken of what is due to the plaintiff in reſpect of the ſaid ſum of 16,000*l.* and intereſt for the ſame; and that what ſhall appear due in reſpect thereof

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may be raiſed by ſale or mortgage, and paid to the plaintiff; and that an account may be taken of what is due to the plaintiff in reſpect of the ſaid portion of 15,000*l.* and the intereſt of the ſame from the death of *Henry*, late Earl of *Lincoln*, her father; and that the defendants Lord *Robert Seymour* and Lord *Grandiſon*, the truſtees of the term of 1000 years, may be directed to raiſe what ſhall appear to be due to the plaintiff by ſale or mortgage of the ſaid eſtates and premiſes compriſed in the ſaid term.

The defendant, the Duke of *Newcaſtle*, by his anſwer ſtated, that he believes, the ſum of 14,900*l.*, the conſideration money in the indentures of the 12th of *May* 1780 mentioned to have been paid by Lord *John Pelham Clinton* to *Henry*, Duke of *Newcaſtle*, if paid, was the money, which had been raiſed by way of mortgage, and which is now a ſubſiſting charge upon part of the eſtates of the defendant; and which Lord *John Pelham Clinton* claimed as his portion as one of the ſons of the ſaid Duke of *Newcaſtle;* though the defendant ſubmits, that Lord *John Pelham Clinton* was not entitled to any greater ſum, and that no more ought to have been raiſed for his portion, than 10,000*l.* only.

The anſwer farther ſtated, that, the family eſtates being under very heavy incumbrances, *Henry*, late Earl of *Lincoln*, was induced to join in executing the power for charging the ſaid eſtates with 16,000*l.* from the confidence he had in conſequence of the covenants and agreements in the deed poll of the 14th of *September* 1778, that the whole of the ſaid 16,000*l.* would be faithfully applied to the diſcharge of the debts of *Henry*, Duke of *Newcaſtle*, for the benefit of the perſons entitled to the ſaid eſtates under the limitations thereof, and in eaſe and exoneration of the other charges and incumbrances affecting his eſtates; and the defendant therefore ſubmits, that it was incumbent upon the perſon advancing the ſaid 16,000*l.* upon the credit of the ſaid charge to ſee to the application thereof; and that Lord *John Pelham Clinton* was bound to have ſeen, that the ſaid 14,900*l.* was applied purſuant to the covenant in the ſaid deed in payment of the debts of *Henry*, late Duke of *Newcaſtle:* but the defendant is informed and believes, that the whole of the ſaid 14,900*l.* was paid to, or permitted to be received by, *Henry*, Duke of *Newcaſtle*, and was applied by him to his own private purpoſes, and not in payment of the debts owing by him, or in exoneration of any of the charges upon the ſaid eſtates; and as to 1100*l.*, other part of the ſaid 16,000*l.*, it appears upon the face of the ſaid deed poll and the bill, that the ſame or any part thereof never was paid to the Duke of *Newcaſtle*, or applied in the payment of his debts; and therefore the defendant ſubmits, that the ſaid 16,000*l.* or any part thereof ought not now to be raiſed or paid to the plaintiff, or the defendant's eſtates to be ſubjected in any manner thereto: but in caſe the Court ſhall be of opinion, that any part thereof ought to be raiſed and paid to the plaintiff, the defendant ſubmits, that only 10,000*l.* ought to be raiſed or paid under the indentures of 1744 and the 8th and 9th of *May* 1772.

The anſwer farther ſtated, that though the ſum of 10,000*l.* was directed to be raiſed by the decree made upon the 10th of *March* 1780, and though *Thomas*, late Duke of *Newcaſtle*, was a party to the ſuit, yet the defendant is adviſed and believes, the queſtion, whether the whole of the ſaid 15,000*l.* ought to be raiſed under the then exiſting circumſtances of the family, or only 10,000*l.* thereof, was not raiſed or agitated: but that ſuit was inſtituted merely to have the directions of the Court as to mortgaging the term of 500 years inſtead of a term of of 600 years; and the ſuit was merely amicable. *Thomas*, late Duke of *Newcaſtle*, was at that time become the eldeſt ſon, and was entitled to the immediate freehold of the ſaid eſtates expectant upon the deceaſe of his father, and did ſo become an eldeſt ſon, before any part of his portion became payable; and there being only one other child, *viz.* Lord *John Pelham Clinton*, no more ought to have been raiſed for his portion than 10,000*l.* in the whole under the truſts of the indentures of 1744 and the 8th and 9th of *May* 1772; and the defendant ſubmits, that the ſaid decree is erroneous, and intends to inſtitute a ſuit for the purpoſe of being relieved from the ſame; and that the plaintiff ought not to avail herſelf of the decree in the mean time.

As to the portion of 15,000*l.* under the ſettlement of 1775, the anſwer ſubmitted, that no intereſt accrued thereon antecedent to the death of *Henry*, Duke of *Newcaſtle*; and that *Thomas*, Duke of *Newcaſtle*, was bound to keep down ſuch intereſt from that time until his death; and the eſtates are not chargeable with any intereſt in reſpect thereof prior to the 18th of *May* 1795.

The defendants, the executors of *Thomas*, late Duke of *Newcaſtle*, by their anſwer ſtated, that Lord *John Pelham Clinton* having received the ſaid ſums of 5000*l.* and 9900*l.*, in purſuance of the appointment of *Henry*, late Duke of *Newcaſtle*, advanced thoſe ſums to the Duke; and they made up the ſum of 14,900*l.*, mentioned in the indentures of the 12th of *May* 1780 as the conſideration paid by Lord *John Pelham Clinton* for the aſſignment of the ſum of 16,000*l.*

They inſiſted, that the appointments made by *Henry*, late Duke of *Newcaſtle*, of the portion of 15,000*l.* under the indentures of 1744 and the 8th and 9th of *May* 1772 were illuſory and void; and the ſum of 15,000*l.* ought therefore to have been equally divided between *Thomas*, late Duke of *Newcaſtle*, and Lord *John Pelham Clinton* for default of a good appointment.

The defendants farther ſtated, that they have been informed, and believe, that, though *Thomas*, late Duke of *Newcaſtle*, did nominally join in the petition for the payment of the 10,000*l.* in fact the petition was entirely conducted by *John Jackſon*, agent to *Henry*, late Duke of *Newcaſtle*, and to Lord *John Pelham Clinton*; and as *Thomas*, late Duke of *Newcaſtle*, did not conſult any profeſſional man, and was totally ignorant of his right under the ſettlement of 1744, and permitted his name to be uſed from an apprehenſion of diſobliging his father, and from the perſuaſion, that he and Lord *John Pelham Clinton* would do what was right, therefore the circumſtance of his joining ought not to prejudice his right to conteſt the validity of the appointment; and as Lord *John Pelham Clinton* received 7400*l.* more than his fair proportion of the ſaid 15,000*l.*, and the money ſo received by him formed the pecuniary conſideration mentioned in the aſſignment of the 16,000*l.*, the defendants inſiſt, that in caſe the Court ſhall direct the 16,000*l.* to be raiſed, the ſame ought not to be paid to the plaintiff, but 7400*l.* ought to be paid thereout to the defendants, as ſurviving executors of *Thomas*, late Duke of *Newcaſtle*, together with all the intereſt accrued in reſpect thereof from the 6th of *May* 1780; and the reſidue only ought to be paid to the plaintiff.

Attorney General and Mr. Romilly for the plaintiff, and Mr. Graham for the executors of Lord John Pelham Clinton.—With reſpect to the queſtion of maintenance under the ſettlement of 1775, there is a clear intention to provide maintenance for younger children, though they were not entitled to the capital, nor to intereſt, *quâ* intereſt, of the capital, till the death of the ſurvivor of the Duke of *Newcaſtle* and Lord *Lincoln*. Care was taken to poſtpone the payment of the principal, merely to eaſe the Duke of *Newcaſtle* from that payment in his life: but it could not be the intention, that in the event, that has happened, the plaintiff was to be left deſtitute of any proviſion for her maintenance, unleſs the Duke, ſurviving his ſon, thought proper to reſcue her from that ſituation.

The next queſtion relates to the charge of 16,000*l.* It was competent to the Duke of *Newcaſtle* and Lord *Lincoln* to raiſe that ſum for any purpoſe. The purpoſe, for which they did raiſe it, made it the perſonal eſtate of the Duke; and therefore he could diſpoſe of it, as he pleaſed. Lord *John Pelham Clinton* advancing the ſum of 14,900*l.* to the Duke was a creditor to the extent of that ſum at leaſt. But, beyond that, the real meaning was to give that ſum of 16,000*l.* ſubſtantially to the Duke of *Newcaſtle*, to go in payment of his debts generally. There is nothing like a bargain for the benefit of Lord *Lincoln;* which is a mere conjecture from the extraordinary words of the deed. It is a gift by two perſons having a right to give, as they thought proper. They had the abſolute intereſt, not deſtined to any particular purpoſe. The deed, however inaccurately expreſſed, amounts to nothing more than an appointment in favor of the Duke of *Newcaſtle* generally. It is ſaid, the Duke died inſolvent, and therefore his creditors have an intereſt. What ſuit could they have inſtituted? The Court could not regard one ſet of creditors more than another. Lord *John Pelham Clinton* was a creditor by ſpecialty, a creditor under the ſettlement, and in reſpect of natural love and affection, and a ſubſiſting creditor at the time. What prior claim has any other creditor? He was unqueſtionably a fair creditor. He purchaſed the charge by the 14,900*l.* Love and affection is an unimpeachable conſideration to fill up the whole ſum.

Solicitor General, Mr. Lloyd, Mr. Galley, and Mr. Sutton, for the defendant, the Duke of Newcaſtle.—As to the claim in reſpect of maintenance, it cannot be imputed as the intention, that the eldeſt ſon ſhould wait for his proviſion, and the younger children ſhould not wait

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wait for their portions; that the eldeſt ſon ſhould have the eſtate charged with 30,000*l.* inſtead of 15,000*l.*, which might be the effect of the accumulation. It cannot be ſuppoſed, that the intention was to enable Lord *Lincoln* to charge the eſtate of his father without his conſent in favor of his own younger children. That would be a monſtrous propoſition, and would require clear words. The governing words "*after the death of the ſurvivor*" import the contrary. Thoſe words govern the whole declaration of truſt, and the power of appointment given to Lord *Lincoln.* The truſtees had no power in the life of the Duke to do any thing, unleſs directed by the Duke. The firſt declaration, enabling the truſtees to act at all, limits their power to acting in the life of the Duke, only if he ſhould ſo direct. The parties could not have ſo inconſiſtent an intention as that imputed to the ſubſequent words words, taken ſingly. Other parts of the ſettlement prove this. What is ſaid as to the intereſt in the clauſe giving veſted intereſts in the portions upon attainment of the age of twenty-one, or marriage of daughters, in the life of the ſurvivor of the Duke of *Newcaſtle* or Lord *Lincoln*, but poſtponing the payment till ſix months after the death of the ſurvivor, is deciſive. Upon the plaintiff's conſtruction what neceſſity was there for a direction, that they ſhould be paid with intereſt at the rate of 4 *per cent.* from the death of the ſurvivor? From the next clauſe alſo it is clearly not intended, that without a joint appointment during their joint lives or the ſeparate appointment of the ſurvivor after the deceaſe of the other theſe portions ſhould be raiſed, or any intereſt paid in the lifetime of either. The ſame inference ariſes from the proviſion, that no ſale or mortgage ſhould be made, until ſome of the portions ſhould become payable, except for the advancement of the younger ſons. How were the truſtees to raiſe the maintenance? Firſt, the term was not veſted in them: Secondly, the power to raiſe the portions is confined to the period after the death of the Duke of *Newcaſtle*, unleſs he ſhall direct it to be raiſed in his life. It is alſo provided, that no ſale or mortgage ſhall be made, until ſome of the portions ſhall become payable, except for the advancement above-mentioned. It is clear then, it could not be raiſed by ſale or mortgage. Beſides that, what propoſition is ſo monſtrous as that theſe truſtees were to make a mortgage every quarter-day, in order to raiſe an income for this young lady. It is impoſſible to ſuppoſe, theſe quarterly payments, intended for her maintenance, were to be raiſed at once after the death of the Duke, after ſhe had been kept, as it is ſaid, deſtitute for ſixteen years, and at a time, when ſhe might have been dead. From the direction, that the reſidue and overplus of the rents and profits beyond the maintenance ſhould be received by the perſon, who for the time being ſhould be entitled to the reverſion or remainder of the premiſes expectant on the determination of the term, though the ſettlement is not correctly drawn, it is evident, they adverted to the time, when the term ſhould come into poſſeſſion, and the maintenance could be raiſed out of the rents and profits, the natural fund for maintenance, and it was not intended to be raiſed out of the reverſion. The Duke of *Newcaſtle* was not the perſon entitled to the reverſion or remainder expectant upon the determination of the term; his eſtate for life being prior to the term. Clearly therefore that clauſe could not apply to any thing to happen during the Duke's life. The plaintiff's conſtruction is inconſiſtent with every part of the ſettlement. The true meaning was, that the Duke's eſtate ſhould remain undiſturbed, except ſo far as it is expreſsly charged by the ſettlement, or as he ſhould voluntarily charge it by directing the portions to be raiſed during his life. The proviſion for the younger children during the life of the Duke was left to his generoſity and the large proviſion made for Lady *Lincoln;* and the allowance made by the Duke was conſiderable.

The effect of allowing the plaintiff's claim will be to give her a charge upon the inheritance of 25,000 *l.* inſtead of 15,000 *l.* even without intereſt; and it might have been much increaſed, if the Duke had lived longer. But if every quarter the truſtees had made a mortgage for 150 *l.* it muſt have been with intereſt, at ſuch rate of intereſt as they could have procured it at. They could not have got ſuch a ſum, if at all, upon a reverſionary term, at a diſtant period, at a leſs rate of intereſt than 5 *per cent.* They muſt alſo have charged the coſts of each mortgage. The mortgagees might have filed a bill to forecloſe; and if the Court would enlarge the time for redemption, they would direct an account, and turn intereſt into principal. The conſequence is, the property would have been ruined. This is a large eſtate: but if it was the caſe of a private family, the eldeſt ſon might have nothing, and the younger children by the accumulating charge run away with the whole eſtate; and a younger ſon become an eldeſt would loſe his proviſion, and have nothing. The inconvenience to the

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plaintiff is not equal to thoſe on the other ſide. The eldeſt ſon would have been in the ſame ſituation, depending equally upon the Duke for his maintenance. From the inaccuracy of the ſettlement throughout it is not a greater ſtrain to hold, that this proviſion was to take effect only in caſe of the death of the Duke of *Newcaſtle* in the life of Lord *Lincoln*, than the Court will be obliged to make upon other parts of the ſettlement.

There is nothing to enable the Court to rectify this under the head of miſtake in miſplacing the term, as in *Uvedaile* v. *Halfpenny*, 2 *P. Will.* 151, where the term for raiſing portions was put after the eſtate-tail to the ſons, plainly contrary to the intention. There is no inſtance of a mortgage or ſale for maintenance. There are ſome few caſes, not late caſes, in which the portion itſelf has been raiſed in the life of the anceſtor with great reluctance. Lord *Macclesfield* ſtrained much againſt ſuch a conſtruction in *Butler* v. *Duncomb*, 1 *P. Will.* 448, *Pierpoint* v. *Lord Cheney*, 1 *P. Will.* 488, *Pre. Ch.* 503, and *Rereſby* v. *Newland*, 2 *P. Will.* 93. (*a*).

The next queſtion has more difficulty. The deed of the 14th of *September* 1778 clearly demonſtrates an intention on the part of Lord *Lincoln* to make a bargain; and ſhews, he did not mean to give this ſum of 16,000 *l.* as a pure and abſolute gift to his father. If that was the intention, what poſſible reaſon could there be for the ſecond deed executed upon the ſame day? Every proviſion of that inſtrument makes it leſs clear, that it was intended as an abſolute gift to the Duke. The language is not that of pure gift, but of covenant and condition. The words "debts of the Duke of *Newcaſtle*" muſt have ſome meaning. It is difficult to ſay, what ſpecific debts of the Duke were to be diſcharged out of this money: but it is clear, ſome debts were to be diſcharged. There are only two kinds: debts affecting the eſtate, and mere perſonal debts, to be recovered by action, though the repreſentative may have a right againſt the eſtate to be reimburſed. Another conſideration is, that the Duke being tenant for life ſubject to charges, which with reſpect to his receipt of the rents and profits might be conſidered as his debts, though to be again recovered over againſt the eſtate, thoſe words might be uſed with regard to that deſcription of debts. It was clearly not the intention, that this ſum of 16,000 *l.* and in-

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(*a*) The principal caſes are collected in Mr. *Cox's* note to *Butler* v. *Duncomb*, 1 *P. Will.* 453 and the note, *ante*, vol. 2. 481.

tereſt ſhould be immediately raiſed; for the deed looks to a diſpoſition to have effect at the death of the one or the other of them, not in the life of both. It muſt therefore have been the intention of Lord *Lincoln* to make ſome bargain, which he conceived would be beneficial to himſelf, or thoſe, who might claim after him. At the date of that inſtrument it was known, that Lord *Lincoln* could not live long. The appointments were a mere contrivance to give the money to the Duke. If the Duke had made a gift of the 16,000 *l.*, it could not have been retained againſt his creditors. The plaintiff claims 1100 *l.* of this money as a volunteer.

An inquiry as to the ſtate of the family debts, which exceeded all the property of the Duke both real and perſonal, might throw ſome light upon it.

Attorney General in reply.—As to the ſecond queſtion, a perſon claiming under this charge claims under the execution of a power, protected by all the conſiderations of the ſettlement, by which that power was given. It is a fallacy therefore to ſay, the plaintiff claims 1100 *l.* of this money as a volunteer. The conſideration to be looked to is not that ariſing out of the immediate act of charging. There is no room for any imputation of fraud. It was perfectly competent to Lord *Lincoln* to concur or to refrain from concurring in the charge of 16,000 *l.*, and to ſay, for what purpoſe it ſhould be raiſed; and what he has ſaid amounts to giving it to the Duke as a part of his perſonal eſtate. What is there in the deed to confine the word "debts", ſo as to make it incompetent to the Duke to pay creditors of any kind? Neither his executors nor deviſees could defeat that voluntary gift by the Duke, even in favor of creditors, until it ſhould be ſeen, whether the perſonal and real eſtates of the Duke would be ſufficient for his debts. If they are ſufficient, even conſidering the plaintiff as a volunteer, perſons claiming under the will are equally volunteers, and therefore cannot diſturb the act. *Primâ facie* this ſum belongs to the plaintiff, and ought to be raiſed at her ſuit.

With reſpect to the other point, looking to that part of the truſt of the term, which relates to raiſing a ſum of money for maintenance and education, without connecting it in conſtruction with the context, it is impoſſible there can be any doubt. The doubt ariſes from conſidering it with the context; and then the queſtion is,

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is, whether a plain declaration can be controlled to the prejudice of a perſon claiming a ſubſiſtence by arguments, which muſt at leaſt leave the Court in conſiderable doubt, whether the plain declaration was meant to be affected by the ambiguous and inaccurate expreſſions of the reſt of the ſettlement. In the former part of the ſettlement they looked to two contingencies; the death of the Duke of *Newcaſtle* in the life of the Earl of *Lincoln*, and the death of the Earl in the life of the Duke. Having diſtinguiſhed between thoſe two contingencies in the part of the ſettlement immediately preceding they come to conſider, what is to be done with the younger children of Lord *Lincoln* immediately after his death. It is impoſſible, if they meant this money to be paid after the death of both, that they ſhould waive the repetition of that ſentence occurring in the part immediately preceding, and ſhould expreſs the contingency of the death of the Earl only, without adverting to the circumſtance juſt before in their view, that he might die in the life of the Duke. It is ſaid, the eldeſt ſon would have been in the ſame ſituation: but that is not correct. His intereſt in the reverſion would have been a conſiderable intereſt, capable of being uſed as a proviſion for maintenance; and it is not ſo violent a preſumption, that ſome care would have been taken of the eldeſt ſon as that due care would have been taken of fourteen or fifteen younger children.

The ſum provided for maintenance is not the intereſt of the portions, but ſuch yearly ſum and ſums of money, not exceeding the intereſt, as Lord *Lincoln* ſhould appoint; or, in default of appointment, ſuch yearly ſum or ſums as would be equivalent to what the intereſt of the reſpective portions thereby intended for ſuch child and children (were he, ſhe, or they, then entitled thereto) would then amount to at the rate of 4 *per cent.* The term is at any rate miſplaced. It would have been prior to the Duke's eſtate for life, if the ſettlement had been drawn with ſtrict accuracy. That would have avoided all the argument about the quarterly mortgages, *&c.* That was not the intention. The eſtate for life may juſt as well give way upon the manifeſt intention as the eſtate-tail in the caſe cited. Is the Court againſt the expreſs words of the ſettlement to be preſſed upon theſe arguments, ariſing only from the inconvenience of mortgaging, to ſay, they would have refuſed to raiſe this maintenance by that mode, and thereby have plunged fourteen or fifteen children into diſtreſs; though after the deceaſe of their father they are expreſly entitled to ſuch ſums of money for maintenance as he ſhould appoint, not exceeding the intereſt of their portions; or, in default of appointment, as would be equivalent to the intereſt; the ſettlement adverting to the two contingencies in the part immediately preceding, and then dropping one of them. Will the Court in a ſettlement, at all events inaccurate, the truſt term being at all events miſplaced, abide by the expreſs words, or control them by arguments drawn from ſuch inaccurate expreſſions?

The queſtion upon the validity of the appointments made by the Duke of *Newcaſtle* between his ſons under the ſettlement of 1744 was not argued. The *Attorney General* having obſerved, that the doctrine as to illuſory (*a*) appointments ſtands upon no ground more ſolid than the opinion of the Judge of the day, who is to decide ſuch a queſtion, was ſtopped by the Maſter of the Rolls; who declared, he muſt at preſent take the decree to be right; and could not enter into that queſtion, unleſs it was put in iſſue in a more ſolemn way.

March 5.

Maſter of the Rolls (after ſtating the caſe)—It is perfectly clear, the portions themſelves could not be raiſed during the lives either of the Duke of *Newcaſtle* or Lord *Lincoln*, except, in the caſe of both being alive, with the conſent of both, or, in the event of Lord *Lincoln*'s ſurviving the Duke, with the conſent of Lord *Lincoln*: otherwiſe they were to become veſted intereſts in the ſons at the age of twenty-one and in the daughters at that age or upon marriage, but not to be payable till ſix months after the death of the ſurvivor of both the Duke and Lord *Lincoln*; and were to carry intereſt at the rate of 4 *per cent.* from the death of the ſurvivor, and from that time only. The plaintiff cannot contend, that if ſhe had attained the age of twenty-one, or been married, in the life of the Duke of *Newcaſtle*, ſhe could have brought a bill to have her portion raiſed. Upon the power given to Lord *Lincoln* to direct 5000*l.* to be raiſed for advancing in the world any younger ſon I deſire it to be obſerved, that any

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(*a*) See *Boyle* v. *The Biſhop of Peterborough*, *ante*, vol. 1. 299.

any ſum to be applied to that purpoſe was to be raiſed after the death of the Duke of *Newcaſtle*. Hitherto therefore every thing is poſtponed to the death of the Duke.

The queſtion ariſes upon the next clauſe; whether according to the true conſtruction of that clauſe, notwithſtanding the preceding words, and coupled with them, if the plaintiff had brought a bill during the life of her grandfather, refuſing to make an allowance for her maintenance, ſhe would have been entitled to a decree for the ſeveral ſums of money provided by the ſettlement for maintenance. Her delaying that bill till this time, whatever is thrown out in the numerous caſes upon this ſubject, cannot make any difference. The conſtruction muſt be the ſame, whether the bill was brought then, or is filed at this time, when ſome of the inconveniences, that are ſo obvious as to ſtrike every one, will not occur. It is contended for the plaintiff, that ſhe may upon this clauſe, the truſt to raiſe the maintenance being ſo limited only upon the death of Lord *Lincoln*, avail herſelf of the plain words, notwithſtanding all the inconveniences, that might have reſulted from a bill in the life of the Duke, and what will ſtill occur from throwing upon the eſtate all the arrear of intereſt.

Upon the words of this clauſe taken ſingly I ſhould have no heſitation in ſaying, the plaintiff would have a right to have the words ſtrictly followed, and to have this maintenance raiſed upon the firſt quarter-day after the death of her father during the life of her grandfather. But notwithſtanding the numerous caſes upon this point, in moſt of which the party contending for the portion or maintenance has ſucceeded, it is now perfectly ſettled, and the more modern caſes have clearly eſtabliſhed, and it appears to have been the opinion of Lord *Macclesfield*, who always found fault with what his predeceſſors had done, but always went as far as they did, that the Court will lay hold of any words, from which it can be fairly inferred, that it was not the intention to charge a reverſionary term with raiſing portions in that manner, which muſt bring infinite inconvenience upon the reverſioner; and if upon the context of the ſettlement any thing can be collected, by which it may appear, that it could not be the intention of the parties to raiſe them in that way, the Court is extremely eager to lay hold of that. That has been uniformly laid down by Lord *Cowper*, Lord *Macclesfield*, and all their ſucceſſors.

The queſtion then is, whether the ſucceeding words, upon which I chiefly rely, do not amount to demonſtration, that it could not be the intention, that the quarter-day after the death of the Earl of *Lincoln*, and each ſubſequent quarter-day, the plaintiff might come, and inſiſt upon having her maintenance raiſed by ſale or mortgage. It was contended, but ſlightly, that the Duke of *Newcaſtle*'s eſtate for life might have been affected. Clearly it could not by the words of this inſtrument, according to all the caſes. It muſt have been raiſed, if at all, out of the reverſionary term to ariſe after his death. By the expreſs words the power of raiſing money by ſale or mortgage could not be uſed, until one of the portions became payable, except with regard to the ſum of 5000*l.*; which might be accelerated for the purpoſe of advancing the younger ſons in the world.

The clauſe directing, that, after the maintenance ſhould be raiſed and paid, the reſidue and overplus of the rents and profits, if any, ſhould, until the portions ſhould become payable, be received by the perſon or perſons, who for the time being ſhould be entitled to the reverſion or remainder of the premiſes expectant upon the determination of the term, for his, her, and their, own uſe and benefit, appears demonſtration, that the object of this ſettlement could not have been that, which the Court, unleſs forced by words uncontrolled by any context, will never ſuppoſe, that this maintenance ſhould be raiſed by ſale or mortgage; but that it was intended to come out of the annual profits; and that the ſurplus of the annual profits ſhould go to the perſon or perſons entitled to the reverſion or remainder expectant upon the determination of the term. That could not be during the life of the Duke of *Newcaſtle.* The term was not in poſſeſſion; nor was the Duke a perſon entitled to the reverſion or remainder expectant upon the determination of the term. It is remarkable, that in *Stevens* v. *Dethick*, 3 *Atk.* 39. this very caſe is relied on by Lord *Hardwicke*. Theſe words prove, the intention of the ſettlement was not, that the maintenance ſhould be raiſed by ſale or mortgage. They control the general words; and ſhew plainly, it was to be raiſed out of the annual rents and profits.

I have ſtated, that there is a great number of caſes upon this ſubject; moſt of which are referred to in Mr. *Cox*'s note (*a*); and

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(*a*) See Mr. *Cox*'s note to *Butler* v. *Duncomb*, 1 *P. Wms.* 453.

I cannot omit to obſerve the great obligations of the Bench and the Bar to Mr. *Cox* for his edition of *Peere Williams*; in the notes to which all the caſes upon the ſubjects they treat of are to be found. It is not neceſſary to comment upon all theſe caſes. *Gerrard* v. *Gerrard*, *Greaves* v. *Maddiſon*, *Corbet* v. *Maidwell*, and *Butler* v. *Duncomb*, are very extraordinary caſes; eſpecially the laſt; in which Lord *Maccleſfield* did not think himſelf at liberty to depart from the preceding caſes: and it is remarkable, that he thought fit to raiſe part of the portion contrary to what appears to have been his opinion: but in *Worſley* v. *The Earl of Granville*, 2 *Veſ.* 334, Lord *Hardwicke* obſerves, that *Butler* v. *Duncomb* looks much more like an award than a decree; as it certainly was.

The caſe of *Brome* v. *Berkley*, 2 *P. Wms.* 484, which went afterwards to the Houſe of Lords, was much relied on by Lord *Hardwicke* in *Stevens* v. *Dethick*. The Lord Chancellor called to his aſſiſtance the Maſter of the Rolls; and their reaſons againſt mortgaging reverſionary terms are very well worth reading. Though the portion was abſolutely to be paid at the age of twenty-one or marriage, yet as the maintenance was not to commence, until the eſtate of the truſtees ſhould take effect in poſſeſſion, on account of that circumſtance the Court refuſed to raiſe the portion; and upon an appeal to the Houſe of Lords that decree was affirmed. That caſe is only material to ſhew, that, as it appeared, the maintenance was not intended to be raiſed, until the eſtate of the truſtees took effect in poſſeſſion, thence the Court collected the ſenſe of the parties, that the portion ſhould not be raiſed until after that time, from the inconvenience, that would ariſe.

Hebblethwaite v. *Cartwright*, *For.* 31 is a ſtrong caſe in favor of the plaintiff. I mention it only to diſtinguiſh it from this caſe. Lord *Talbot* finding no words to control the words of the ſettlement directed the portions to be raiſed; and he diſtinguiſhed it from the caſe of *Brome* v. *Berkley* upon the circumſtance, that in that caſe the maintenance was not to be raiſed until the commencement of the eſtate of the truſtees.

In *Stanley* v. *Stanley*, 1 *Atk.* 549, very ſhortly reported, it is laid down as a general rule, that if there be a term for years or other eſtate limited to truſtees for raiſing portions for daughters, payable at a certain time, which is become a veſted intereſt, they ſhall not ſtay until the death of the father and mother, unleſs ſome intention appears to poſtpone it; and if there does, the Court will always take notice of ſuch intention, and poſtpone it accordingly; and the latter caſes, as *Brome* v. *Berkley* and others, ſhew, the Court will lay hold of very ſmall grounds, that ſpeak the intent of the parties, to hinder the raiſing the portions in the life of the father and mother.

Hall v. *Carter*, 2 *Atk.* 354. was not a caſe upon a marriage ſettlement, but upon a will. The eſtate of the jointreſs was not affected: but the maintenance and portion were raiſed by mortgaging the reverſionary term: but it was determined upon the ſame ground that it was directed by the will; with a decided diſapprobation of raiſing portions in that manner during the life cf the father.

I now come to a caſe in words very ſimilar to this; upon which words the decree was founded. That is the caſe of *Stevens* v. *Dethick*, 3 *Atk.* 39. I can find no entry of it in the Regiſter's Book. The words in that caſe are almoſt literally thoſe of this ſettlement. Lord *Hardwicke* enters into the conſideration of the principles; and ſtates moſt of the caſes, particularly *Butler* v. *Duncomb*, and *Brome* v. *Berkley*. If the report is correct, there can hardly be two caſes ſo exactly alike. The very words, that occur in this caſe, are thoſe, from which Lord *Hardwicke* inferred, that the portion was not to be raiſed during the life of the father.

I think it but right to mention another caſe, ſubſequent in date to that, and the laſt before Lord *Hardwicke* upon the ſubject. That is the caſe of *Lyon* v. *The Duke of Chandos*, 3 *Atk.* 416, in which Lord *Hardwicke* thought fit to declare, the portion bore intereſt during the life of the grandfather: but I have got the truſt of the term from the Regiſter's Book: and there is an abſolute truſt to pay the portion after the death of the father, the Marquis of *Carnarvon*, without any words, from which it can be inferred, that it was not to be raiſed till after the death of the grandfather; who died about a year before the bill was filed. The truſt of the term was, if there ſhould be but one daughter, to raiſe 15,000 *l*, if two or more, 25,000 *l*.; the ſame to be paid to ſuch daughter or daughters, when ſhe or they ſhould reſpectively attain the age of twenty-one years, or be married, the Marquis of *Carnarvon* being dead.

Lord *Hardwicke* was of opinion, the portion was ſo clearly ordered to be raiſed upon the death of the Marquis of *Carnarvon*, that there was no room for implication. He therefore decreed, that it ſhould be raiſed with intereſt from the death of the Marquis of *Carnarvon*. Then I confeſs, it is ſingular; as the maintenance could not be raiſed until after the death of the Duke of *Chandos*.

This caſe ſtands only upon theſe words; and the queſtion is, whether I can infer, that it was the intention, that, if the Duke of *Newcaſtle* had not made any allowance for the maintenance of the plaintiff, ſhe had a power during his life to compel a ſale or mortgage. I am glad it did not happen in this caſe, that the Duke by refuſing to allow any maintenance made it neceſſary to have a bill filed in his life, ſtating, that he would give nothing. The Court would perhaps have found it neceſſary to make the ſame determination. The bill very properly ſeeks only the difference between 400 *l.* a-year and 600 *l.* a-year. The ſubſequent words are demonſtration, that the maintenance was not to be raiſed but by the annual rents and profits; and therefore was not to be raiſed during the life of the Duke. I am of opinion, conſidering the principles, that have obtained upon the conſtruction of ſettlements as to raiſing portions out of reverſionary terms, that upon the true conſtruction of this ſettlement this portion was not ſo to be raiſed.

With regard to the only caſe, that was particularly cited at the hearing, *Pierpoint* v. *Lord Cheney*, it is moſt accurately reported, as moſt of the caſes are, in *Peere Williams*. The words of the ſettlement are pretty nearly according to that Report. It is clear, Lord *Macclesfield* did mean to raiſe the maintenance. He thought himſelf bound to do it. He certainly ſpoke againſt raiſing portions out of reverſionary terms: but he conſidered the words to be ſo expreſs, that he could not poſſibly get over them. He directed the inquiry only to ſee, whether it would be for the benefit of the young lady herſelf to raiſe it; and whether it would leave ſufficient for her portion.

The next point ariſes upon the claim to the ſum of 16,000*l.* That is affected in two ways.

Firſt, it is objected, that the conſideration, upon which Lord *John Pelham Clinton* obtained the aſſignment of that ſum, was the ſum of 14,900*l.* raiſed for him under the appointments of his father whereas he was not entitled to more than 10,000*l.* in any event; and that the diviſion of the ſum of 15,000*l.* between him and *Thomas*, late Duke of *Newcaſtle*, was fraudulent and illuſory. With reſpect to that, I cannot permit the decree, in which the late Duke of *Newcaſtle* was a party, to be impeached in this collateral way, and hold, that this was a void or an illuſory appointment. If they think fit to quarrel with that, they muſt file a bill. I ſhall therefore conſider Lord *John Pelham Clinton* a purchaſer for valuable conſideration for the ſum of 14,900*l.*

The queſtion then remains as to the ſum of 1100*l.*; whether that was not appointed in fraud of ſome truſt in the Duke. It is a very extraordinary tranſaction; and all theſe ſtrange words, I am afraid, are only a circuitous way of ſaying, it is for the Duke himſelf. I ſhall leave the executors of the Duke to try, if they can make any thing of it. They appear to me to be the only perſons, who can call for an application of that ſum upon the ſuppoſed undertaking by the Duke not to give it gratuitouſly, but to apply it to the diſcharge of his debts.

By the decree it was declared, that the ſum of 16,000*l.* charged upon the ſaid eſtates ought to be raiſed, with intereſt at the rate of 5 *per cent* from the death of the late Duke of *Newcaſtle*; and that out of the money ſo to be raiſed the ſum of 14,900*l.* be paid to the plaintiff, with the intereſt due thereon; and that the ſum of 1100*l.*, the remainder of the ſaid ſum of 16,000*l.*, and the intereſt due in reſpect thereof, be paid into the Bank to the credit of the cauſe, ſubject to farther order; with liberty for any of the parties to apply by bill or otherwiſe; and if there ſhould be no application within the ſpace of twelve months, the ſame to be paid to the plaintiff; and that out of the ſum of 11,100*l.* 3 *per cent* Conſolidated Bank Annuities, the fund produced by the intereſt of the ſaid ſum of 16,000*l.*, ſo much as had ariſen in reſpect of the ſum of 14,900*l.*, part thereof, ſhould be transferred to the plaintiff; and the remainder be transferred to the Accountant General, &c; with liberty to apply; and if no application ſhould be made within twelve months, to be transferred to the plaintiff.

It was declared, that the plaintiff was not entitled to intereſt upon the portion of 15,000 *l.* under the indentures, dated the 19th and 20th of *May* 1775, until the death of her grandfather *Henry*, late Duke of *Newcaſtle*; and that what ſhould be found due for intereſt thereon at the rate of 4 *per cent* from that time, with the capital thereof, be raiſed by ſale or mortgage of the term in the pleadings mentioned &c.

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Reſiduary legatee having been admitted to a copyhold eſtate was in poſſeſſion above 19 years; when the heir obtained poſſeſſion by ejectment. After acquieſcence for nine years the reſiduary legatee filed a bill, claiming the eſtate, as having been a redeemable intereſt in the teſtator; and having been treated as ſuch, it was ſo decreed. An account was directed of the money expended in repairs, &c; and inquiries as to incumbrances: the Court inclining ſtrongly to ſupport the acts of the heir, while in poſſeſſion.

SARAH HOARE being ſeiſed for her life of copyhold premiſes, holden of the manor of *Hampſtead*, and *Jane Sarah Hanſard*, wife of *John Hanſard*, and *Mary Lewis*, wife of *Richard Lewis*, being entitled in remainder to them and their heirs in equal moieties, ſurrendered upon the 24th of *June* 1732, in conſideration of 750 *l.*, to the uſe of *Henry Leche*, his heirs and aſſigns, ſubject to redemption.

At a Court holden for the manor upon the 20th of *May* 1765 it was preſented, that *Sarah Hoare*, *Richard Lewis*, *Mary Lewis*, *John Hanſard*, and *Sarah Hanſard*, were dead, and that *Henry Leche* was dead, and *John Leche* of *Carwarden* was his nephew and heir at law, and that *John Leche* of the *Middle Temple* brought into Court a letter of attorney from *John Leche* of *Carwarden* to him to be admitted, and to ſurrender to the uſe of *Henry Michael Evans*, ſubject to redemption upon payment of the ſaid 750 *l.* and intereſt; and ſaid *John Leche* informed the Court, that ſaid 750 *l.* and intereſt were not paid; and *John Leche* of *Carwarden* by his ſaid attorney was thereupon admitted, to hold to him and his heirs, according to the effect of the ſaid two conditional ſurrenders, and ſubject to the equity of redemption thereof by the heirs of the ſaid *Sarah Hanſard* and *Mary Lewis*, and at the ſame time did ſurrender the premiſes to the uſe of *Henry Michael Evans*, his heirs and aſſigns, according to the cuſtom of the manor, but ſubject to ſuch redemption by the heirs at law of the ſaid *Sarah Hanſard* and *Mary Lewis*.

Letters of adminiſtration *de bonis non &c* of *Henry Leche* were granted to *John Leche* of the *Middle Temple.*

By deed of aſſignment, dated the 4th of *June* 1765, reciting the original mortgage, and that 1100*l.* was then due for principal and intereſt, and that by an agreement between *John Leche* and *George Errington* on the 20th of *May* laſt *John Leche* agreed to ſell and ſurrender to *Henry Michael Evans*, truſtee for *Errington*, his heirs and aſſigns, the mortgaged premiſes for all the eſtate and intereſt the heir at law of *Henry Leche* or his perſonal repreſentative could have therein, in conſideration of 512*l.* 10*s.*, with proper covenants, that there was then due upon the ſaid premiſes 1100*l.* at leaſt; and that the premiſes were not liable in law to be redeemed until payment of the ſaid ſum of 1100*l.* at leaſt, it was witneſſed, that in conſideration of the ſaid ſum of 512*l.* 10*s.* *John Leche* aſſigned, transferred, and ſet over, *&c*, the ſaid recited bond and obligation and the ſaid ſum of 1100*l.* and all other ſums due and to grow due upon the ſame, to hold to *George Errington*, his executors, adminiſtrators, and aſſigns, and gave him authority to receive the money.

This aſſignment contained a covenant, that the money due was 1100*l.*, and that the premiſes were not liable to be redeemed, until the heir or heirs of *Sarah Hoare*, *John Hanſard* and *Sarah*, his wife, and *Richard Lewis* and *Mary*, his wife, ſhould pay to *Errington*, his executors, and adminiſtrators, the ſum of 1100*l.* at leaſt.

By indentures, dated the 12th of *June* 1766, reciting, that *Errington* was in poſſeſſion of the premiſes under the agreement of *May* 1765, the ſurrender of *John Leche* and the admiſſion of *Henry Michael Evans*, and that the buildings were at the time *Errington* entered greatly in decay and ſubject to be preſented and forfeited on that account, and that *Errington* neceſſarily laid out in ſuch rebuilding and repairing and in obtaining poſſeſſion by courſe of law the ſum of 122*l.* 17*s.* and that *Robert Fryer* had agreed with *Errington* for the abſolute purchaſe of his right, title, property, claim and intereſt, of, in, and to, the above-mentioned premiſes and every part thereof at and for the price or ſum of 630*l.*, and alſo to reimburſe *Errington* the ſaid ſum of 122*l.* 17*s*, *Errington* in conſideration of the ſum of 752*l.* 17*s.* granted, bargained, ſold, aſſigned, transferred, and ſet over, unto *Robert Fryer*, his heirs and aſſigns, all his right, title, and intereſt, claim, property, and demand, whatſoever of, in, and to, all and ſingular the above and within mentioned copyhold meſſuages, lands and premiſes, and every part and parcel thereof, with their appurtenances, together with the full benefit and advantage as well at law as in equity of the aſſignment of the bond within mentioned, and of all and every the ſeveral articles, clauſes, covenants, matters and things, therein contained, to have and to hold, enjoy, receive, and take the ſame and every part thereof to *Robert Fryer*, his heirs, executors, adminiſtrators, and aſſigns, to his and their own uſe and uſes, in as full and ample a manner as the ſaid *George Errington* might have held and enjoyed the ſame.

This indenture contained a covenant, that *Errington* had not done any act, by reaſon whereof the copyhold premiſes or any part thereof, or the money due thereon, or the ſaid before-mentioned bond or aſſignment, or any of the clauſes, covenants, *&c*, may be ſurrendered, releaſed, forfeited, charged, or incumbered, except two leaſes for three years.

Upon the 7th of *July* 1766 *Henry Michael Evans* ſurrendered to the uſe of *Robert Fryer*, his heirs and aſſigns, ſubject nevertheleſs to ſuch equity of redemption, if any, as the heir or heirs of *Sarah Hoare*, widow, *Richard Lewis* and *Mary*, his wife, and *John Hanſard* and *Sarah*, his wife, or any of them, had in the ſame; and *Robert Fryer* was admitted, to hold to him and his heirs according to the cuſtom, and ſubject to ſuch equity of reremption.

Robert Fryer ſurrendered the copyhold premiſes to the uſe of his will; and by his will, dated the 5th of *February* 1768, and atteſted by two witneſſes, he made the following diſpoſition.

"This is the laſt will and teſtament of me *Robert Fryer* "of *Hampſtead* in the county of *Middleſex*. Firſt I give and "bequeath my late wife's niece *Jane Lewis* 100*l*."

The teſtator then after ſome other pecuniary legacies gave and bequeathed a leaſehold farm and premiſes and all his right, title, and intereſt, therein unto *Mary Uſher*, one half; and he directed the other moiety to be divided between *James England* and *Mary Davis*; and he gave the live and dead ſtock upon the farm, and the leaſehold furniture, plate, linen, *&c*, to the ſame perſons in the ſame proportions, upon condition, that *James England* and *Mary Davis* ſhould pay each 100*l.* to his executors. He gave to his brother *John Fryer* 26*l.* *per annum*, to be paid quarterly out of the profits of the farm, half by *Mary Uſher*, and one quarter each by *James England* and *Mary Davis*. Then, after giving his ſervants 10*l.* for mourning, and 20*l.* each to his executors for their trouble, he diſpoſed of the reſidue in the following manner.

"All the reſt and reſidue of my goods, chattels, and effects, "whatſoever, after payment of my juſt debts, funeral charges, "and the aforeſaid legacies, I give and bequeath unto *Mary Uſher*; "and if it pleaſe God ſhe ſhould die before ſhe arrives at "twenty-one years of age, unmarried, or marry without conſent "of the joint executors, or without lawful iſſue, then the whole "or her ſhare, ſtock, and utenſils, on the farm, together with all "the reſt and reſidue of my eſtate and effects, excluſive of the "legacies before mentioned, to be equally divided among the "ſaid *Jane Lewis*, *Elizabeth Jefferies*, *Ann Johnſon*," and other perſons, ſhare and ſhare alike; and the teſtator appointed *William Wildman* and *Thomas Fawcett* his executors.

The teſtator *Robert Fryer* died in *February* 1768 without iſſue.

Mary Uſher after the death of *Robert Fryer* entered into poſſeſſion and receipt of the rents and profits of the copyhold premiſes; and upon the 17th of *Auguſt* 1768 ſhe was admitted. She afterwards married *John Murgatroyd*; and by the ſettlement made upon that marriage, dated the 20th of *July* 1773, the money due upon the mortgage of the copyhold premiſes was ſettled in truſt to pay one moiety according to the appointment of *Mary Murgatroyd* by deed or will; and for want of appointment to pay the intereſt to her for life; and in caſe ſhe ſhould ſurvive her ſaid huſband, upon truſt to pay one moiety of the principal to her; and as to the other

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moiety, after her death, in truſt for the iſſue of the marriage; with a power of appointment to *Mary Murgatroyd* in caſe of their deceaſe before they ſhould be entitled; and in default of appointment, in truſt for *Mary Murgatroyd*, her executors and adminiſtrators.

John and *Mary Murgatroyd* continued in poſſeſſion of the premiſes till the death of *John Murgatroyd*. His widow afterwards married *Thomas Hardy*; and they were in poſſeſſion till the year 1788.

By a deed executed in *January* 1786 *Mary Hardy* appointed, and *Thomas Hardy* confirmed, to *Fawcett*, his heirs, executors, and adminiſtrators, one moiety of all the ſaid mortgage money and mortgaged premiſes, and all their eſtate, right, title, and intereſt, in and to the other moiety thereof to the uſe of *Fawcett*, his heirs, executors, adminiſtrators, and aſſigns, for ſecuring the ſum of 850*l.* with intereſt.

John Fryer, the eldeſt brother and heir at law and according to the cuſtom of the manor of *Hampſtead* of *Robert Fryer*, died inteſtate in 1778; leaving *George Fryer*, his only ſon and heir at law and according to the cuſtom of the manor; who died inteſtate; leaving *Mary*, the wife of *William Reeves*, his only ſurviving child, and heir at law and according to the cuſtom of the manor.

In 1788 *William* and *Mary Reeves* brought an ejectment and obtained a verdict; under which they took poſſeſſion of the copyhold premiſes; which they ſurrendered to the uſe of *William Reeves* for life; remainder to the uſe of *Mary Reeves* for life; remainder to the heirs and aſſigns of the ſurvivor of them.

The bill was filed upon the 10th of *May* 1797, after the death of *Mary Reeves*, by *Thomas Hardy* and his wife; praying, that the plaintiff *Mary Hardy* as reſiduary legatee of *Robert Fryer* may be declared entitled to the poſſeſſion of the ſaid copyhold premiſes; and that the defendant *William Reeves* may be declared a truſtee for her, and be decreed to deliver up poſſeſſion and ſurrender the ſame to her; and that an account may be taken of the rents and profits received by the defendant *Reeves*; and in caſe it ſhall appear, that the other defendants have any legal or equitable intereſt in them, then that they may ſurrender, &c.

The bill charged, that after *Robert Fryer*'s death *John Fryer* was made defendant to a bill for redemption filed by *George Lewis* and *Richard Hanſard*; and that by his anſwer he admitted, that *Robert Fryer* at his death was merely a mortgagee: but that ſuit was not proceeded in.

The defendant *Reeves* by his anſwer inſiſted, that *Robert Fryer* was entitled to an abſolute and indefeaſible eſtate of inheritance; and that he ſo conſidered himſelf; for at the time he became a purchaſer the equity of redemption was abſolutely barred by length of poſſeſſion; and upon the faith of ſuch title *Robert Fryer* made very conſiderable improvements upon the premiſes; and erected upon part thereof two new houſes, and rebuilt two others and laid out conſiderable ſums of money upon the premiſes and eſtate, to the amount of 1000*l.* and upwards; and in all reſpects treated the premiſes as his abſolute indefeaſible property; and frequently declared, they would come to his nephew *George Fryer*, as his nephew and cuſtomary heir.

The defendant denied, that the effect of the anſwer of *John Fryer* to the bill of redemption filed by *Lewis* was an admiſſion, that *Robert Fryer* was merely a mortgagee. He ſtated, that the ſuit was abandoned; and another bill of redemption was afterwards filed by *George Lewis* againſt *John Fryer*; who by his anſwer inſiſted upon his abſolute title; and that bill was diſmiſſed for want of proſecution.

The defendants *Barnes* and his wife claimed an annuity of 20*l.* a year, charged upon the premiſes during the life of Mrs. *Barnes* under a ſurrender by the defendant *Reeves* and his wife.

The defendant *Fox* claimed as a mortgagee without notice under a ſurrender, made on the 3d of *April* 1789, by *Reeves* and his wife to the uſe of *Fox*, his heirs and aſſigns, for ſecuring the ſum of 680*l.* and intereſt, ſubject to the ſaid annuity to *Mary Barnes*.

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The defendants *Wright* and *Brownent* were the executors of *Fawcett*, the ſurviving executor of *Robert Fryer* and one of the truſtees in the ſettlement made upon the marriage of *John Murgatroyd* and *Mary Uſher*, and a creditor under the deed executed in *January* 1786.

The iſſue of *John Murgatroyd* by *Mary*, his wife, claimed under their marriage ſettlement.

The defendant *Jones* claimed under a deed executed in 1786 and a ſurrender to the uſes of that deed an annuity of 36*l.* a-year during the life of *Mary Hardy*.

In ſupport of the anſwer of the defendant *Reeves* it was proved, that about twenty-eight years ago the premiſes were in a very ruinous condition; and *Robert Fryer* pulled down the old houſes and built three new houſes in their place; and expended a large ſum in other conſiderable alterations, additions, and improvements. A year before *Fryer* became entitled the ſum of 200*l.* was laid out in repairs and improvements by *Errington*. About twelve years ago one of the tenants took down a ſhed, and built three dwelling-houſes in the place; which amounted to 200*l.* at leaſt; and about three or four years ago other tenants laid out at leaſt 50*l.*

Mr. Piggott and Mr. Johnſon for the Plaintiff, Mr. Lloyd for the Executors of Fawcett, and Mr. Hart for the Infant Children of John and Mary Murgatroyd—The queſtion is, whether this eſtate was redeemable in *Robert Fryer*, or not. The legal eſtate paſſed by the ſurrender to the truſtee for *Errington*, who was admitted clearly ſubject to the original equity of redemption then ſubſiſting in the heirs of the mortgagor; and the money due upon the mortgage paſſed by the aſſignment. *Errington* therefore became affected by all the equity, by which the original mortgagee was affected. The agreement between *Errington* and *Robert Fryer* ſhews, the original mortgagee had not been in poſſeſſion; for it is recited, that *Errington* had been put to conſiderable expence in recovering the poſſeſſion of the premiſes only a year before. *Robert Fryer* only took ſuch intereſt as *Errington* had; and the language of the aſſignment ſhews, nothing more was intended; and that *Fryer* conſidered himſelf only as aſſignee of a mortgage. The firſt time that any doubt was intimated as to the right to redeem was in the admittance of *Fryer;* which was ſubject to the equity of redemption "*if any.*" It cannot be preſumed, that *Fryer* acquired an indefeaſible intereſt. Suppoſe, this queſtion, inſtead of ariſing between the reſiduary legatee of *Robert Fryer* and the cuſtomary heir, had been agitated between the latter and creditors: it would have been impoſſible for the heir to ſay, this was not applicable to the debts. Why is the reſiduary legatee in a worſe ſituation? If any releaſe of the equity of redemption had taken place, it would not have been treated as a mortgage in 1765; when the firſt proceeding upon the Rolls of the manor appears. There is every reaſon to think, that *Fryer* during the period between his admiſſion and his death, not two years, made no alteration in the title. The only circumſtance is, that he made ſome improvements upon the eſtate: but that makes no difference; for money laid out in laſting improvements would be tacked to the mortgage money and paid with intereſt by the heir of the mortgagor coming to redeem. So ſoon as in *Auguſt* 1768 *Mary Uſher* was let into quiet and peaceable poſſeſſion. It is true, ſhe was admitted as reſiduary legatee: but that proves nothing. It cannot be ſuppoſed, that the brother of *Fryer*, his heir at law, living upon the ſpot, would have let her take poſſeſſion, unleſs ſome reaſon was ſuggeſted, ſhewing, that ſhe had the better title. She continued in poſſeſſion without any claim againſt her for a period very little ſhort of that, which would have been a bar under the *Statute of Limitations*. The nine years, that have elapſed ſince, can have no effect; eſpecially againſt the infants. It appears from the will of *Fryer*, that his cuſtomary heir was not the great object of his bounty.

Some of the old caſes go very near this point. In *Tabor* v. *Greaves*, 2 *Vern.* 367. 1 *Eq. Ca. Ab.* 328. it was held, that an old mortgage ſhall go to the executor, not the heir: the equity of redemption not being foreclosed or releaſed; though the mortgagor ſays by anſwer, he will not redeem. That was after two deſcents caſt. In *Lake* v. *Thomas* (*ante*, vol. 3. 17.) the uſual plea upon the length of time was put in. The bill contained a charge, that the defendant had kept accounts upon it as a mortgage; and as that was not denied by anſwer, the plea was over-ruled; and the Lord Chancellor refers to a caſe before Sir *Thomas Clarke*, in which after a great number of years redemption was decreed as to

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part of the eſtate, on the ground, that it had been treated as a mortgage by keeping accounts and deviſing it as a mortgage: but the other part in the hands of another family was held irredeemable.

The defendants, who claim as incumbrancers under *Reeves*, are affected with notice; as they might have had notice upon the Court Rolls. They would have found by looking into the title, that at a certain period it was a mortgage title; and they muſt have known, that it was at leaſt very doubtful, whether it did not continue ſo. They are therefore in a different ſituation from mortgagees having advanced money without notice, and having the legal intereſt; and the plaintiff is entitled to a ſurrender of the legal eſtate, if it is in them.

A queſtion may be made upon the will of *Robert Fryer*; whether this intereſt in this copyhold eſtate did not paſs to *Mary Uſher* under the will; and conſequently, whether ſhe ought not to have been admitted as deviſee, not as reſiduary legatee. It is clear, that where a copyhold eſtate is ſurrendered to the uſe of the will, a deviſe of "*all my eſtates*" will paſs the copyhold eſtate, if there is no freehold eſtate; and even where there are freehold eſtates, according to *Tendril* v. *Smith*, 2 *Atk.* 85, and many other authorities. *Tilley* v. *Simpſon* cited by Lord *Kenyon* in *Fletcher* v. *Smiton*, 2 *Term Rep. B. R.* 659, is a ſtrong authority, that the word "*eſtate*" after the word "*chattels*" muſt have applied to ſomething beyond perſonal eſtate. In *Hogan* v. *Jackſon*, *Cowp.* 299, the word "*effects*" was after great conſideration held ſufficient to paſs a fee. In *Tanner* v. *Morſe*, *For.* 284, words very like thoſe in this caſe were held to paſs a fee. What ground is there for ſuppoſing, this man meant to die inteſtate as to this copyhold eſtate? Having ſpecifically bequeathed a great part of his perſonal eſtate, and given his heir at law a proviſion out of his leaſehold eſtate, he has by this ſweeping clauſe given every thing not before diſpoſed of.

Mr. *Graham* (*Amicus Curiæ*) mentioned a caſe of *Campbell* v. *Beckford*, at the Cockpit; where redemption was decreed upon an old mortgage merely on the circumſtance, that accounts had been kept.

Mr. Richards and Mr. Sutton for the Defendants William and Mary Reeves, and Mr. Campbell for the Annuitants claiming under them—Firſt, This was not perſonal eſtate in the hands of *Robert Fryer:*

Secondly, being real eſtate it did not paſs by his will; and the Court cannot take into conſideration, whether it did, or not.

Upon the firſt point, the *dicta*, that have been referred to, do not apply to this caſe. The queſtion is, whether, where perſons, who originally claimed under a mortgagee, have been treating the ſubject for a length of time as real property, it ſhall be conſidered as real or perſonal property between volunteers claiming equally under them.

It does not appear in this cauſe, but there is evidence upon the records of the Court (*a*), that poſſeſſion was taken not very long after the mortgage. The language of the inſtrument between *Errington* and *Fryer* is very material. It is evident, *Errington* did not conſider this as mortgage property; and *Fryer* was in poſſeſſion, conſidered himſelf ſo, and laid out money, as abſolute owner of real property. The expreſſion, that was relied on, as to the coſts of obtaining poſſeſſion might have been uſed with reference to a tenant. *Errington* being in poſſeſſion deals with the property as his own; and conveys it as ſuch; by the words in the ſurrender, "*ſubject nevertheleſs to ſuch equity of redemption, if any,*" &c. meaning only not to warrant the title; which was originally a mortgage title: but they are not to be conſtrued into an admiſſion, that it was merely a mortgage title. The language of the ſurrenders is merely the language of the ſteward of the manor.

(*a*) At the hearing the defendants produced an anſwer of the plaintiff and his late wife, by which the latter ſtated, that ſhe is informed and believes, the mortgagee *Leche* in the year 1740 entered into poſſeſſion of this copyhold eſtate; the mortgagor having neglected to pay intereſt; and the mortgage being a very ſcanty ſecurity; that the mortgagee, and the aſſignees under a variety of aſſignments, continued in poſſeſſion from the year 1740 till 1766; and that *Henry Leche* was admitted in 1765.

The bill, to which this anſwer was put in, was filed by the defendants in this cauſe, *Reeves* and his wife, before they brought the ejectment, to compel the lord of the manor to admit them, and calling upon *Hardy* and his wife, who had been in poſſeſſion, having been admitted under the will of *Fryer*, to account for the rents and profits they had received.

Both parties claiming under *Fryer*, his acts are not to be put out of conſideration. By his acts he could bind all claiming under him as volunteers. Can it be ſuppoſed, he would have laid out a conſiderable ſum of money, compared with the value of the eſtate, in the hope of having it reſtored to him by a mortgagee, who had attempted a redemption, and failed; the value of the eſtate being leſs than the money due? Will any Court ſuffer a mortgagee to build houſes upon the mortgaged eſtate, which may not be neceſſary? He treated it as his own abſolute property. His ſurrendering to the uſe of his will was a ſtrong act of ownerſhip. It is not uſual for a mortgagee to ſurrender the legal eſtate to the uſe of his will in order to diſpoſe of it. He may do ſo: but in general he ſuffers it to deſcend to his heir. The heir in permitting *Mary Uſher* to take poſſeſſion acted under a miſtake of the law.

The queſtion upon the will was tried in the ejectment. Can it be ſuppoſed, that Lord *Kenyon*, having the will before him, could have paſſed over the only queſtion he was to try? The ſubmiſſion for nine years to that deciſion has (*a*) a much ſtronger effect than their uninterupted poſſeſſion for nineteen years.

To call a Court of Equity into action activity and reaſonable diligence muſt be uſed (*b*). It is not competent to the plaintiff now to claim this as perſonal property in right of his wife, who poſſeſſed it ſo long as real property. If a bill for redemption had been filed againſt theſe plaintiffs, they would have defended themſelves on the ground of long poſſeſſion. In *Beckford* v. *Cloſe*, 26th *July* 1784, at the Cockpit, a demurrer to a bill for redemption on the ground of the length of time had been overruled in *Jamaica*. Upon an appeal from that deciſion Lord *Kenyon*, then Maſter of the Rolls, went through all the caſes; and obſerved, that Lord *Talbot* and Lord *King* had both decided, that a demurrer to a bill for redemption is good; and Lord *Kenyon* ſaid, there is more good ſenſe in that than in the *dictum* of Lord *Hardwicke*, which was but a *dictum*, that it is not good, and the defence ought to be by plea.

(*a*) In the argument for the plaintiff it was ſuggeſted, that the verdict had been obtained, not upon the conſtruction of the will, but upon a point raiſed by the defendant in the ejectment as to the legitimacy of the heir.

(*b*) Lord *Deloraine* v. *Brown*, *Smith* v. *Clay*, 3 *Bro. C. C.* 633. *Amb.* 645. *Hercy* v. *Dinwoody*, *ante*, vol. 2. 87.

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The will only treats of perſonal and leaſehold property; and it is impoſſible, that by the word "*effects*" the teſtator could mean any thing but perſonal property. It is ſaid, he had no real eſtate: but that does not appear. If the will had been atteſted by three witneſſes, any freehold property according to the plaintiff's argument would have paſſed. The legacies are clearly given out of the perſonal eſtate. In diſpoſing of the reſidue he ſays "exclusive of "the legacies." There is no inſtance, where even debts, much leſs legacies, have been charged upon real eſtate by a will of this ſort. In *Tilley* v. *Simpſon* the will begins with the remarkable expreſſion, which has had great weight in the conſtruction of ſuch wills, perhaps more than it deſerves; a declared intention of the teſtator to diſpoſe of all his worldly eſtate. After that very ſlight words will be ſufficient to carry all the property. This will has no ſuch declaration. In *Hogan* v. *Jackſon* the words of the will were very large. The moſt common principle of the Court is, that an heir at law is to be favored.

Mr. Piggott in reply—I agree to the principle, that the Court favors an heir at law. I alſo agree, that the poſſeſſion of a mortgage for twenty years is a ſufficient anſwer to a bill for redemption; and that to a bill ſimply ſtating that caſe a demurrer lies, upon the authoriry of *Beckford* v. *Cloſe*, before Lord *Camden* and Lord *Kenyon*. But there are facts in this caſe demonſtrating beyond a doubt, that, whatever right the mortgagee had, he did not avail himſelf of that right. The claim of the plaintiff is an equitable claim to have a truſt declared upon the legal title; which prevailed, and could not fail of prevailing, at law. The ejectment was not brought, until thoſe, who were likely to know, whether there was a right of redemption, or not, were dead. *John Fryer* during his life acknowledged the title of the reſiduary legatee. Can they talk of *locheſs*, who permitted this for near twenty years, perhaps only one day being wanting to the completion of the title under the *Statute of Limitations*, to be conſidered as perſonal property?

As to the anſwer of *Mary Hardy* now produced, what ſhe ſtates is only, as ſhe has heard and believes. She was not born until long after the year 1740; and what ſhe ſtates is wholly a miſtake. *Henry Leche*, the mortgagee, never was admitted; though there was a ſurrender by the mortgagors. *Evans*'s admiſſion, which was upon the ſurrender of the perſonal repreſentative of *Henry Leche*, the mortgagee, was, ſubject to redemption; and the words "if any," throwing a doubt upon the right, never occurred until the admiſſion of *Fryer*. *Errington* took poſſeſſion of it as perſonal eſtate by the aſſignment of the perſonal repreſentative of the mortgagee; and he dealt with it as ſuch. That aſſignment recites the mortgage, and that 1100*l.* was due; and contains covenants, that ſuch ſum is due, and that the premiſes are not liable to be redeemed until payment of that ſum. No doubt, it was aſſets for ſimple contract debts: nor can it be denied, that it was redeemable at the date of that aſſignment. The twenty years muſt have begun from that time. He had purchaſed only a debt, and taken the eſtate as a ſecurity.

The aſſignment to *Fryer* is in effect the aſſignment of a debt. The bond and ſecurities for the debt are aſſigned; and all the circumſtances are recited. If the heir of the mortgagors had filed a bill then, can there be a doubt, that they might have redeemed? If this had been wanted for ſimple contract debts of *Fryer*, would it not have been aſſets; according to the conſtant rule, that until foreclosure a mortgage is aſſets? Then it muſt have been perſonal eſtate at the death of *Fryer* for every purpoſe. The defendants then are obliged to contend, that, becauſe he rebuilt three ruinous houſes, and therefore totally unprofitable, being a copyhold eſtate, and though by neglecting to rebuild them he would have incurred a forfeiture, it is to be taken for granted, that a mortgagee coming in in that character, and only a year and a half in poſſeſſion, treated it as his abſolute property. The Court cannot act upon ſuch equivocal circumſtances. It may be concluded, that he might think it probable, that they would not redeem; and it might become an abſolute eſtate in him. There is no ground for doubt: in which caſe only the principle in favor of the heir at law prevails.

The caſe of *Smart* v. *Hunt* (*a*), at the Rolls before Lord *Kenyon*, is a remarkable caſe, and very like this. Redemption was decreed,

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(*a*) *Smart* v. *Hunt*, at the Rolls, *February* the 14th, 1788.

Stephen Smart executed a mortgage, dated the 10th of *June* 1741, to *John Rogers* for a term of 500 years. The mortgagor paid intereſt for two years, and died in *March* 1744; leaving two ſons *Robert* and *John*. *Robert Smart* entered, and paid no intereſt. In 1747, the intereſt being in arrear, he voluntarily let the mortgagee into poſſeſſion, attorned as tenant, creed, though the mortgagors had been out of poſſeſſion 41 years, becauſe an aſſignment had been executed of it as a mortgage intereſt only thirteen years before the decree.

The defendant *Fox* cannot ſtand in a better ſituation than his mortgagor. Enough appeared upon the Court Rolls to put him on his guard; and it was incumbent on him to make inquiry.

Demurrer on the ground of length of time to a bill for redemption of a mortgage is good.

Maſter of the Rolls.—I have no doubt, a demurrer on the ground of length of time to a bill for redemption would be good, if the bill was ſo framed as to ſtate ſuch a caſe.

This caſe is attended with ſome extraordinary circumſtances; and I am ſorry, the acts of the parties have embarraſſed it, and occaſioned all this expence. But it is hardly poſſible upon the proofs to hold, that *Robert Fryer* did not take a redeemable intereſt, when he was admitted. If that is ſo, the queſtion is, whether any thing has been ſince done by him either as mortgagee or under the ideal title as owner of the premiſes, in conſequence of which he died ſeiſed of an irredeemable eſtate?

There is no concluſive evidence, at what time the poſſeſſion of theſe mortgaged premiſes was recovered by the mortgagee; nor does any thing appear reſpecting it until the aſſignment to *Errington*, in *June* 1765. The queſtion is, what *Errington* took under that aſſignment of the bond, with that covenant, that 1100*l.* was due, and that the premiſes were not redeemable for a leſs ſum, and the ſurrender to *Evans*, who was admitted, ſubject to redemption, as truſtee for *Errington*? Theſe two circumſtances taken together, the purchaſe of the bond, with that

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tenant, and paid rent for ſuch part of the premiſes as he occupied. In 1752 *Robert Smart* died. His brother and heir at law *John Smart* died in 1767.

The mortgagee *Rogers* continued in quiet poſſeſſion from the year 1747 until his death in 1754. His ſon, ſole executor, and reſiduary legatee, *John Rogers* entered and continued in quiet poſſeſſion until his death. His two ſons and executors *John Methuen Rogers* and *Thomas Rogers* entered, and continued in quiet poſſeſſion until the 10th of *January* 1775; when they aſſigned to *John Hunt*. The aſſignee entered and continued in poſſeſſion until 1781; when he died. He deviſed the premiſes, conſidering himſelf as having the abſolute intereſt in them, to the defendants; who entered; and continued in poſſeſſion, till the bill for redemption was filed by the eldeſt ſon and heir at law of *John Smart*.

Redemption was decreed.

covenant, and that *Evans* was a truſtee ſubject to redemption, are deciſive evidence againſt *Errington* and all purchaſing under him, that he had nothing more than a redeemable intereſt, and could convey nothing elſe, unleſs he had in the intermediate time between that period and the ſale to *Fryer* acquired the abſolute intereſt. But nothing paſſed between the admiſſion of *Evans* in 1765 and that of *Fryer* in 1766, that can be ſuppoſed to take away the right of redemption acquired by the acts done in 1765.

Then what did *Fryer* do? He was admitted in a very guarded manner. It was not admitted, that he did take a redeemable intereſt: but it is expreſſed thus: "*Subject neverthele ſs to ſuch* "*equity of redemption, if any*, &c." That certainly will not prejudice him. The queſtion is, what he took: whether a redeemable intereſt, or not. The acts done by him, and the extraordinary tranſactions, that have occurred ſince, ſhew, that he and his heirs conſidered it as irredeemable. Evidence was produced to ſhew, what he did upon the premiſes; and it was very forcibly argued for the defendants, that if he converted the property into a different ſpecies of property, which he had no right to do, that is a ſtrong act to ſhew his conception. The evidence is, that the houſes were in a ruinous ſtate; and he pulled them down, and erected others. I have no difficulty in ſaying, a mortgagee of a copyhold may pull down ruinous houſes, and may build much better houſes. The lord has a right to ſay, that the tenant ſhould not let the houſes fall; and might ſeiſe, if he did. The anſwer of theſe plaintiffs now produced is hardly ſufficient evidence; certainly not to bar the right of redemption, if any remained. The ſtatement in that anſwer, that *Henry Leche* was admitted in 1765, is a miſtake.

Mortgagee of a copyhold may pull down ruinous houſes and build better to prevent a forfeiture.

Surrender by mortgagee of copyhold to the uſe of his will is no proof, that he conſidered it irredeemable.

The ſubſequent tranſactions are very extraordinary. *Fryer* died ſeiſed, as it is ſaid, of what he conſidered an irredeemable intereſt. Firſt, the reſiduary legatee in his will comes, and is admitted; the heir not appearing. In what right it was meant to admit her I cannot conceive. The ſurrender to the uſe of the will is no proof, whether it is redeemable or irredeemable. It muſt never be held, that a mortgagee of a copyhold eſtate by ſurrendering it to the uſe of his will underſtands it to be irredeemable. Every wiſe mortgagee will do that, in order that the equitable and legal intereſts may accompany each other. I preſume, at the trial it was looked upon as a mere ejectment brought by the heir; the mortgaged premiſes not being deviſed by any valid inſtrument. In the year 1785 the third heir according to the cuſtom of *Robert Fryer* ſeems to ſuppoſe, that it was an irredeemable intereſt in him; and brings a bill upon that ground againſt theſe plaintiffs; the plaintiff *Mary Hardy* having been admitted under the ſurrender in 1768. That bill alledges, that *Robert Fryer* died ſeiſed of this as real eſtate. To that bill the anſwer, that has been produced, was put in; and *Mary Hardy*, a married woman, ſays, ſhe is informed and believes, that in the year 1740 the mortgagee had taken poſſeſſion. That is certainly a miſtake. But I lay that out of the caſe; for in 1765 *Errington* admitted, he had only a redeemable intereſt. Therefore there muſt be ſome tranſaction from that time. *Errington*'s admiſſion is in favor of the mortgagors, and againſt every perſon claiming under the mortgagee. I rather believe, *Robert Fryer* dealt with this as irredeemable; and thought, ſomething might have happened, that gave him that right: but I cannot hold, that he took any other than a redeemable intereſt.

That bill was not proceeded in; and juſt before the *Statute of limitations* would have barred them theſe defendants prevailed in an ejectment brought in right of the defendant *Mary Reeves* as heir. I will not hear a word againſt the effect of the will. This is not the place for that diſcuſſion. If that point is relied on, let them bring another ejectment. What pretence is there for filing the bill upon a legal title? By filing the bill the plaintiffs confeſs, they were well turned out of poſſeſſion; and pray, that poſſeſſion may be delivered to them of this eſtate, as having been a chattel intereſt in the teſtator. I ſhall therefore now ſuppoſe, this did not paſs by the will. Then after nine years this bill is filed; the plaintiffs finding, they were wrong in ſuffering the heir to recover. What excuſe has the plaintiff for acquieſcing under this ejectment? Every thing he knows now was known to him, and was much more freſh at that time; and they might have made a better defence then than they can now. The plaintiff lies by for nine years, and then files the bill; not only demanding decree, that this was a redeemable intereſt, but an account of the rents and profits, and to ſet aſide every tranſaction, that has taken place

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place ſince. I ſhall pauſe much, before I do that. I will have a minute inquiry as to any money laid out by the defendants or any perſons claiming under them; and I am very much diſpoſed to be liberal to them in any allowance, and even as to the coſts of the ſuit; all which has been occaſioned by the Plaintiffs: but I am bound to declare, that *Robert Fryer* took a redeemable intereſt.

By the decree it was declared, that *Robert Fryer* in the year 1766 and at the time of his death was entitled only to a redeemable intereſt in the copyhold premiſes in the pleadings mentioned; and that the beneficial intereſt therein paſſed to his executors; and was veſted in the defendants *Wright* and *Brownent*, executors of *Fawcett*, ſurviving executor of *Robert Fryer*, upon the truſts of his will; and the defendants *Wright* and *Brownent* admitting, that all the debts were paid, it was declared, that ſuch beneficial intereſt belonged to the plaintiff.

The Maſter was directed to inquire, what fines and fees had been paid by the defendants *Reeves* and his wife upon admiſſion to the ſaid copyhold premiſes; who had been in poſſeſſion ſince the year 1788; what coſts had been incurred in bringing the ejectment againſt the plaintiffs in this cauſe; and it was directed, that an account ſhould be taken of all ſums of money paid by the defendants on account of the copyhold premiſes, of the rents and profits received by them, and of money laid out by them, or by perſons claiming under them, in ſubſtantial repairs or in erecting new buildings; and that the Maſter ſhould inquire, whether the plaintiffs or defendants had made any mortgages upon the premiſes, and whether there are any other incumbrances affecting the ſame; and what is due thereon; and that the Maſter ſhould ſtate their priorities; and directions were given for the appointment of a receiver, and that coſts and farther directions ſhould be reſerved, with liberty to apply.

Before the decree was drawn up the plaintiff preſented a petition to vary the minutes by adding an inquiry, what ſum of money the defendant *Fox* advanced upon the ſecurity of the mortgage in the pleadings mentioned? and whether on or before the 3d of *April* 1789, the date of ſuch mortgage, and when firſt, the ſaid defendant had any and what notice of the title or claim of the plaintiff *Mary Hardy*.

This inquiry was much preſſed by the Counſel for the plaintiff: but the Maſter of the Rolls refuſing to make any variation in the minutes, the decree was drawn up accordingly.

TOLSON *v.* COLLINS.

March 7. 13.

(*Maſter of the Rolls for the Lord Chancellor.*)

As to a preſumed ſatisfaction of a debt by a legacy there is no diſtinction between the caſes of parent and child and of ſtrangers; therefore circumſtances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the application of the rule of ſatisfaction.

MARY *Powell* by her will, dated the 16th of *Auguſt* 1783, gave and bequeathed unto *John Collins*, his executors and adminiſtrators, the full ſum of 800*l.* ſterling, a part of her money in the public funds, upon truſt, that he and they ſhould continue the ſame there or elſewhere at intereſt for the equal benefit of *Jane Collins*, *John Collins*, *Ann Collins*, and *Bonner Collins*, children of the ſaid *John Collins*, until they ſhould attain their reſpective age or ages of twenty-one years, or day or days of marriage, which ſhould firſt happen; and then to pay and equally divide the ſame between them ſhare and ſhare alike; to wit, 200*l.* a-piece to each of them at the reſpective times aforeſaid, together with the dividends or intereſt, profits, and produce, of each one's legacy in the mean time accruing; and in caſe any or either of them, the ſaid *Jane*, *John*, *Ann*, and *Bonner*, ſhould happen to die before his, her, or their, reſpective age or ages of twenty-one years, the teſtatrix gave the ſhare or ſhares of him, her, or them, ſo dying over to the ſurvivors or ſurvivor of them, to be equally divided between them, if more than one, ſhare and ſhare alike; and if there ſhould be but one, wholly to ſuch ſurvivor, to be paid at the reſpective times or time aforeſaid; and ſhe appointed *John Collins* the elder and *Samuel Alford* executors.

The teſtatrix died in *July* 1787.

John Collins, the elder, received the ſum of 800*l.* under the truſt in the will. He died upon the 5th of *May* 1792; leaving all the children mentioned in the will of Mrs. *Powell*, and another ſon, *Henry Collins*, ſurviving.

1799.

TOLSON *v.* COLLINS.

By his will, dated the 23d of *January* 1790, reciting his marriage ſettlement, under which he had a power to appoint the eſtates ſettled upon the marriage after the deaths of himſelf and his wife among his children, or to any one child, and ſubject to ſuch charges as he ſhould think fit, he appointed under that power a part of the eſtates after the deaths of himſelf and wife to his youngeſt ſon *Bonner Collins*, his heirs and aſſigns for ever. Then all the reſt of the eſtates, ſubject and chargeable with the ſeveral legacies and ſums of money for his ſons and daughters after mentioned, he gave to his eldeſt ſon and the heirs male of his body; and, for want of ſuch iſſue, to his ſecond, third, and every other ſon, ſucceſſively in the ſame manner; and, for want of ſuch iſſue, to his daughters, equally, as tenants in common, and their reſpective heirs and aſſigns; and he charged all the ſaid eſtates, except the part appointed to *Bonner Collins*, with ſeveral ſums given to each of his ſons and daughters; *viz.* to *Jane Collins* and ſome others 2500*l.*, and to the reſt 2000*l.*; directing, that if either of his ſons or daughters ſhould die under the age of twenty-one, the ſum of money charged for ſuch ſon or daughter ſo dying ſhould ſink into the eſtate. The teſtator then impoſed a condition upon his eldeſt ſon to confirm a contract, into which he had entered for the ſale of part of the eſtate; and gave to his ſon *Henry* ſome lands, to which he directs his eldeſt ſon to make a complete title. He then gave all other his real eſtates, ſubject to certain truſts, to the uſe of his ſons ſucceſſively in tail; with remainder to his daughters.

As to a preſumed ſatisfaction of a debt by a legacy there is no diſtinction between the caſes of parent and child and of ſtrangers; therefore circumſtances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the application of the rule of ſatisfaction.

The teſtator alſo gave and bequeathed to his daughter *Jane Collins* the ſum of 500*l.*, to be paid to her at her arrival to the age of twenty-one years, if ſhe ſhould arrive to that age, but not otherwiſe, together with the intereſt in the mean time for her maintenance and education at the rate of 4*l. per cent. per annum*, to be paid as therein mentioned.

The teſtator gave ſimilar legacies to his other children; and he gave all the reſidue of his perſonal eſtate upon truſt to be called in and turned into money, and applied in payment of his debts and legacies; and he directed the deficiency of his perſonal eſtate to be paid out of his real eſtate. The teſtator appointed his wife *Jane Collins* and ſeveral other perſons executors of his will.

The bill was filed by *Jane Collins*, the daughter, who had attained the age of twenty-one, and her huſband, claiming the legacy of 200*l.* under the will of *Mary Powell.*

The queſtion was, whether the plaintiffs muſt not elect to take the legacy of 200*l.* under the will of *Mary Powell*, or the proviſion under the will of *John Collins*?

Mr. Mansfield for the Plaintiffs contended, that they were clearly entitled both to the legacy of 500*l.* under the will of the teſtator *John Collins* and to the ſum of 200*l.* under the will of Mrs. *Powell*; which was a debt due by *Collins*; who by his will expreſsly directed his debts to be paid; and ſhewed no intention, that the legacy of 500*l.* ſhould be a ſatisfaction: the other proviſions being out of the caſe, as depending upon the ſettlement.

Solicitor General and Mr. Cooke for the Defendants—The caſes have decided this; that where the teſtator has mixed truſt funds with the maſs of his own property, and has then made a diſpoſition in favor of his children, and they can make a claim upon his property in reſpect of thoſe truſt funds, the diſpoſition made in favor of his children is *primâ facie* to be conſidered as in ſatisfaction of thoſe demands. A preſumption ariſes; and it is neceſſary for thoſe, claiming againſt the diſpoſition he makes, to rebut that preſumption. It is extremely important not to diſturb that range of caſes.

The teſtator *John Collins* having mixed the truſt fund with his perſonal eſtate makes a proviſion for his children; and conſiders the ſituation of them all in that diſpoſition; including his ſon *Henry*; who takes nothing under the will of Mrs. *Powell.* It is a diſpoſition of the whole property, of which he was poſſeſſed. He intended by that diſpoſition to make that proviſion for his children, which he thought the proper proviſion for them, according to the diſcretion, that a parent has a right to exerciſe with regard to his children. The direction, that upon the death of a ſon or daughter under the age of twenty-one the ſum charged for ſuch ſon or daughter ſhould ſink into the real eſtate, ſhews, he intended to make a proviſion for his younger children, and not to charge the eldeſt ſon beyond what he thought neceſſary for that proviſion.

All theſe caſes with regard to children are very much founded upon this ſuppoſition; that, when a father is providing for his children, he is conſidering the obligation he is under to provide for them, and making that diſpoſition he thinks fit to make among them upon a view of all the circumſtances.

The queſtion is, whether the intention was, that theſe children, (for it will extend to the others,) ſhould remain creditors upon his eſtate for this ſum of money, or that the proviſion he makes for them by his will ſhould be in ſatisfaction of that demand. There are many caſes, where a parent mixing and blending with his own perſonal eſtate that, which belonged to his children, and afterwards making a diſpoſition in favor of thoſe children, is deemed to intend a ſatisfaction for that debt due from him to them. The obligation he is under is double; the one conſtituted either by his own previous act or that of ſome other perſon: the other the natural obligation he is under to maintain his children. He is providing for the diſcharge of the latter obligation; and is preſumed to intend at the ſame time to diſcharge both. In *Hinchcliffe* v. *Hinchcliffe* (*ante* vol. 3. 516.) this ſubject was very much under conſideration. It is impoſſible conſiſtently with that deciſion to hold, that the plaintiffs are entitled to claim the ſum of 200*l.* under the will of Mrs. *Powell* as creditors, and alſo the proviſion for the plaintiff *Jane Tolſon* under the will of her father. Wherever property remains diſtinct in the hands of Truſtees, ſeparate from the maſs of the teſtator's property, evidence is required, to ſhew, the teſtator at the time he made his will had it in contemplation to include the truſt property in his own; becauſe it is not naturally included: but wherever it is naturally included, that is, if the teſtator is originally a debtor by contract or covenant to his children, or becomes ſo by receiving truſt property, perhaps improperly received, by which he is ſtrictly debtor, not to his children, but to the Truſtees, it is clearly determined, that the property, to which the children are entitled, being mixed with the maſs of his own property, the children cannot claim that as creditors, and at the ſame time take a benefit given by the will. That is eſtabliſhed by *Weyland* v. *Weyland*, 2 *Atk.* 632. and many other caſes, particularly *Hinchcliffe* v. *Hinchcliffe*. In that caſe the ſum of 6000*l.* was improperly received by the Biſhop of *Peterborough*. It ought to have been received by the truſtees.

The direction, that appears in this will, for payment of the debts, upon which ſome ſtreſs has been laid, has occured in almoſt every caſe, in which this queſtion has undergone diſcuſſion; and that has never been conceived to make a difference. That direction has been conſidered as applying to debts of a different deſcription. The perſonal eſtate in this caſe is very inſufficient for the debts and legacies; and the teſtator in the will adverts to that circumſtance; and charges the deficiency upon the real eſtate.

The caſe of parent and child has been always conſidered very different from that of ſtrangers with reſpect to this ſubject. The reaſon is, that a parent makes a diſtribution of his property with a view to the extent of the property he poſſeſſes, and diſpoſes of the reſidue with a view to its being ſubject to the charge he makes in favor of his other children. In *Herne* v. *Herne*, 2 *Vern.* 555. the ground of the deciſion is, that the will imports a diſpoſition of the whole eſtate. So this will imports a diſpoſition of the whole property, and makes what the teſtator conceives a proper proviſion for his wife and all his children; and therefore a condition is implied, that the proviſions by the will ſhall be taken in ſatisfaction. *Weyland* v. *Weyland* was a very ſtrong caſe, ariſing upon a ſettlement and an inteſtacy; and it was there held, that the father becoming a debtor by his wrongful act is preciſely in the ſame ſituation as if he was debtor by covenant; and your Honor ſeemed alſo to think ſo in *Hinchcliffe* v. *Hinchcliffe*. In *Hartop* v. *Whitmore*, 1 *P. Will.* 681. Lord *Maccleſfield* ſays, if a father gives a daughter a portion by his will, and afterwards gives to the ſame daughter a portion on marriage, this by the laws of all other nations as well as *Great Britain* is a revocation of the portion given by the will. Moſt other countries have adopted the *Civil Law;* and there is no doubt upon that, if the diſpoſition is of all the property, the child muſt take what is given as a ſatisfaction of the *legitima portio*. The cuſtom of *London* agrees with this. In many caſes the queſtion has ariſen, whether a perſon, not a child, is within this rule; and a ſtrong diſtinction has always been held between the caſes of children and of other perſons: *Spinks* v. *Robins*, 2 *Atk.* 492. *Powel* v. *Cleaver*, 2 *Bro. C. C.* 500.; where that point was ſtrongly laboured. In thoſe caſes and many others of that kind the queſtion has depended upon this; whether the perſon, from whom, the proviſion was derived, intended to put himſelf in *loco parentis*; and a different conſtruction has ſometimes prevailed upon that ground. *Copley* v. *Copley*, 1 *P. Will.* 147. is very important in this view. Your Honor in *Hinchcliffe* v. *Hinchcliffe* obſerved, that it is ſhortly ſtated in *Peere Williams*. It is ſupplied in a degree by Mr. *Cox*. I (*a*) find by a manuſcript note of that caſe, that the portion of 8000*l.* under the ſettlement was alſo payable at all events at the age of twenty-one. There was no declared intention: but the ſame property was charged with three ſeveral ſums, payable at different times, ſome leſs beneficial than others. Strictly ſpeaking, it was not a ſatisfaction: but being a proviſion for a child out of a family eſtate, it was conſidered that ſhe was to have one portion only, and not three. In this caſe the proviſion claimed muſt come in the ſame way out of the intailed eſtate. *Copley* v. *Copley* was a very ſtrong caſe; for the firſt portion of 5000*l.* was a charge by the grandfather. The ſubſtance of theſe deciſions is, that they ſhall not take both proviſions: *Ruſhout* v. *Ruſhout*, 3 *Bro. P. C.* 132. *Jeſſon* v. *Jeſſon*, 2 *Vern.* 255.; *Thomas* v. *Kemiſh*, 2 *Vern.* 348. *In Walpole* v. *Lord Conway*, 3 *Barnard.* (*b*) 153. the 5000*l.* was really a debt due to the truſtees in the marriage ſettlement, not part of the teſtator's perſonal eſtate. The difficulty there conſiſted in his not being debtor of the 5000*l.* There would have been no doubt, if he had been ſo.

This caſe is not to be diſtinguiſhed from either of thoſe. It is clear, the teſtator *Collins* was debtor for this ſum. The children muſt reject the will, or take the proviſion under it; not, becauſe the teſtator was actually in poſſeſſion of the property, but becauſe he looked upon it as part of his property. The children are there-

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(*a*) The *Solicitor General.*

(*b*) The *Solicitor General* obſerved, that though thoſe Reports are not approved of, they are generally in ſubſtance pretty correctly ſtated; and that two manuſcript notes of the caſe here cited, one an extract by Mr. *Joſhua Sharpe* from the papers in his poſſeſſion, agreed in ſubſtance with the Report.

fore all bound to elect. There is no doubt, what the election will be; as the legacy of 500*l.* is much more than the 200*l.* with intereſt.

Mr. Mansfield, in reply—I admit, ſmall differences in the time of payment, *&c.* where the queſtion ariſes upon two portions, falling from the ſame parent, and out of the ſame fund, will not prevent a ſatisfaction: whether it ariſes upon a contract for a ſettlement, ſatisfied by a will, or upon a portion by will, ſatisfied by advancement: firſt, from regard to the convenience of the eſtate: ſecondly, becauſe it is unnatural to ſuppoſe, that a man ſhould intend to give two portions, giving one plainly, in a manner ſhewing, he means it as a portion. But where the queſtion is, whether a legacy is a ſatisfaction of a debt, the rule is clear, that if there is a difference in the time of payment or other circumſtances, there is no ſatisfaction.

There is no proof, that the teſtator *Collins* intended to deprive his children of the benefits under Mrs. *Powell*'s will: on the contrary a ſtrong verbal argument ariſes againſt ſuch an inference, from the clauſe directing the payment of his debts and legacies. Is it not the fairer inference, that, when a father gives legacies of 500*l.* to all his children, even after-born children, he intends the children entitled to this ſum of 200*l.* each ſhall not be deprived of it? Otherwiſe he takes from them that ſum in favor of thoſe, for whom no benefit was intended by the teſtatrix *Mary Powell*. It is more natural to ſuppoſe, he did not intend to make any diſtinction to the prejudice of thoſe, to whom Mrs. *Powell* had been bountiful: but it is ſufficient, that there is not the leaſt ground for inferring an intention to ſatisfy. This ſum of 200*l.* is without doubt a plain debt, not a debt by conſtruction. Whence can it be inferred, that it ſhall not be paid as well as any other debt? It is a clear debt; and in that reſpect this caſe is unlike moſt of the others. Any of theſe children might upon coming of age have brought an action againſt their father. The reſidue of the perſonal eſtate naturally means after payment of debts; which is always the anſwer upon the queſtion of exoneration of the perſonal eſtate by a charge upon the real eſtate (*a*). But in this will there is an

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(*a*) *Gray* v. *Minnethorpe*, *ante*, vol. 3. 103. and the caſes there referred to.

expreſs direction to pay the debts and legacies. Where a parent owes a clear debt to his children, and gives legacies to them, or makes a proviſion for them by will not payable at the ſame time, and differing as to circumſtances, there is no more a ſatisfaction than in the caſe of a ſtranger. The intereſt in the 200*l.* under the will of Mrs *Powell* is more valuable than the contingent legacy of 500*l.*

Every caſe cited falls exactly within the rule of double portions; which I admit. *Hinchcliffe* v. *Hinchcliffe* was of that ſort; and the teſtator plainly had acted upon the ſuppoſition, that the property was his own. *Copley* v. *Copley*, *Jeſſon* v. *Jeſſon*, *Thomas* v. *Kemiſh*, are all caſes of the ſame kind. *Walpole* v. Lord *Conway* is like *Noys* v. *Mordaunt*, 2 *Vern.* 581, *Streatfield* v. *Streatfield*, *For.* 176, and *Hinchcliffe* v. *Hinchcliffe*: the father had acted upon property, that was not his: but it was evident he conſidered it as his own. In other caſes, *Powel* v. *Cleaver*, and *Spinks* v. *Robins*, the diſtinction was taken between a proviſion by a ſtranger and by a parent, or where the proviſion is in the nature of a portion.

Maſter of the Rolls—Whatever may be the conjecture as to what this teſtator did intend, the ſingle queſtion is, whether by any rule, that has prevailed with regard to a debt due from a parent to a child and a bequeſt to that child by his will, this can be conſidered as a ſatisfaction of the debt admitted to be due by the teſtator to theſe four children?

I am very glad this caſe has been ſo fully argued; and that the Counſel for the defendant have taken the trouble of looking into almoſt every caſe in any reſpect ſimilar to it: but there is not one caſe, in which it has ever been eſtabliſhed, that a legacy given by the will of a parent is upon any different footing from that of a legacy by any other perſon as to the ſatisfaction of a debt. I rather think, a parent giving to his children a proviſion by his will means that to be all they are to demand from him by way of portion, or otherwiſe: But there is no one caſe, in which that has been adopted. In *Hinchcliffe* v. *Hinchcliffe*, and *Walpole* v. Lord *Conway* there were two circumſtances: Firſt it was perfectly clear, the teſtator meant, that the property claimed under the ſettlement

ſhould

1799.

Tolson *v.* Collins.

Portion by will *primâ facie* a ſatisfaction of a portion by ſettlement.

ſhould be conſidered as part of his perſonal eſtate; and conſequently the children were put to their election: but, beſides that, they were queſtions of double portions; and I admit, that where by the ſettlement out of the common fund a proviſion is made for the children of the marriage, and the parent has given by will as a portion any part of his property, *primâ facie* that given by the will is a ſatisfaction of that by the ſettlement (*a*). But I never heard, that a debt due by a father to a child was ſatisfied by a legacy given by the will of the father; and that the child could not take both; and I do not apprehend, there is any ſuch principle: ſuch a debt is no more ſatisfied by ſuch a legacy than a debt due by a ſtranger is ſatisfied by a legacy under his will, unleſs upon the face of the will, or from the circumſtances as to the manner, in which the teſtator acted upon the property, it can be plainly proved, he meant it ſo (*b*). It is admitted, that if this had been the caſe of an uncle, or any other perſon, not in the ſituation of a parent, it would not be a ſatisfaction; and, however deſirous I am of availing myſelf of any rule in favor of the intention, I muſt not lay down a new rule, carrying the doctrine much farther than it ever has been carried. No caſe has been found of a debt ſo ſatisfied. If the caſe of a debt could be found, the induſtry, that has been exerted, would have produced it, inſtead of caſes upon proviſions in the nature of a portion. This caſe therefore is perfectly free from all the doctrine, that has prevailed as to double portions.

It is ſaid, that, when this teſtator made his will, he gave theſe children a greater benefit than they would have derived under the debt. But it is admitted, that it is not ſuch a benefit as in the caſe of any one but a parent would have been a ſatisfaction. I muſt then have recourſe to the will. If I am to conjecture upon it, I ſhould imagine, the teſtator did not mean theſe children to have both demands: but is there any principle, upon which I can hold the one a ſatisfaction of the other? If any of theſe children had come of age in the teſtator's life, am I to ſuppoſe a ſatisfaction intended as to them?

(*a*) See Mr. *Sanders*'s note to *Bellaſis* v. *Uthwalt*, 1 *Atk.* 427.

(*b*) See *Chancey*'s caſe, 1 *P. Will.* 408; and Mr. *Cox*'s note. *Ante*, vol. 3. 466. 529. 564. *Lee* v. *Brown*, *ante*, 362.

Did he mean them to wait till his death? It can hardly be ſuppoſed.

I am very far from differing from *Hinchcliffe* v. *Hinchcliffe.* On the contrary, I think, it is confirmed by all the caſes, that have been cited. But I decide upon this; that this is not the caſe of a portion; and I lay down generally, that a legacy by a father to a child is not a ſatisfaction of a debt due to the child in any other way than a debt due from a ſtranger would be ſatisfied by ſuch a legacy. I muſt try it by the ſame rule; and ſee, whether it appears by the will, that he conſidered it as part of his perſonal eſtate; and it is admitted, that if this was the caſe of a ſtranger, this legacy would not be a ſatisfaction. Therefore I muſt hold, that this legacy is due to the plaintiff.

March 15.

FORREST *v.* ELWES.

(*The Maſter of the Rolls for the Lord Chancellor.*)

Transfer of ſtock by way of loan upon bond, with condition to replace the ſtock ſix months after the date and in the mean-time to pay intereſt at 5 *per cent.* The ſtock not being replaced, and being depreciated, the obligee is entitled to the value of the ſtock at the time of the transfer with intereſt at 5 *per cent.* to the date of the Report; credit being given for ſome payments on account of the principal.

IN the year 1766 Commodore *Forreſt* having applied to Mr. *Elwes* for a loan of 7 or 8000*l.* Mr. *Elwes* agreed to transfer to him 8000*l.* Old *South-Sea* Annuities; which upon the 30th of *Auguſt* 1766, the day of the transfer, were of the value of 7170*l.* Upon that occaſion a bond was entered into by Commodore *Forreſt*, dated the 30th of *Auguſt* 1766; the condition of which was, "that if the ſaid *Arthur Forreſt* ſhall replace or transfer unto "the aforeſaid *John Elwes*, his executors, adminiſtrators or "aſſigns, in the books of the *South-Sea* Houſe 8000*l.* capital ſtock "in Old *South-Sea* Annuities ſix months after the date hereof, and "ſhall in the mean time pay or cauſe to be paid lawful intereſt "upon 7170*l.* to the ſaid *John Elwes*, his heirs, executors, ad-"miniſtrators or aſſigns, being the produce of the above Old "*South-Sea* Annuities this day ſold and transferred by the ſaid "*John Elwes* to the ſaid *Arthur Forreſt* at $89\frac{5}{8}$" then the obligation was to be void.

By the decree made in this cauſe the will of Commodore *Forreſt* was eſtabliſhed; and the accounts were directed.

By the decree made in the ſupplemental cauſe upon the 14th of *July* 1795 it was declared, that what ſhould be coming due to the eſtate of the teſtator *Forreſt* upon the account of *Willis*, one of the truſtees in the will, who had become a bankrupt, ſhould be anſwered by the defendants, the repreſentatives of *Elwes*; who was another of the truſtees in the will of *Forreſt*; and who was charged in reſpect of a loſs ſuſtained by the eſtate in conſequence of conſignments by his permiſſion to *Willis*; and it was directed, that the balance due from *Elwes* ſhould be paid by the ſaid defendants.

An account was alſo directed to be taken of what was due from the teſtator *Forreſt* in reſpect of the bond-debt to *Elwes*.

By the Maſter's Report, dated the 21ſt of *July* 1798, the eſtate of *Elwes* was charged with the ſum of 10,562*l.* 19*s.* 5*d.* due to the eſtate of *Forreſt* on account of *Willis*: and it was ſtated, that there remained due from the eſtate of *Forreſt* to the eſtate of *Elwes* on account of the ſaid bond for principal the ſum of 6500*l.* and for intereſt thereon, computed to the date of the Report, the ſum of 6463*l.* 17*s.* making together the ſum of 12,963*l.* 17*s.*; leaving a balance of 2400*l.* 17*s.* 7*d.* due to the eſtate of *Elwes* from the eſtate of *Forreſt*.

To this Report the following exceptions were taken:

Firſt, that the bond was upon the face of it entered into upon an uſurious contract:

Secondly, that the Maſter had computed intereſt upon the ſum of 6500*l.*, the principal money alledged to remain due upon the bond, after giving credit for payments made on account of the principal, after the rate of 5*l.* *per cent. per annum* to the date of his Report: whereas, admitting the legality of the bond, the Maſter ought not to have made any computation of intereſt upon any money ſecured thereby, but to have taken an account of the dividends, which would have accrued upon the ſum of 8000*l.* Old *South-Sea* Annuities from the date of the bond to the date of the Report, and to have charged the eſtate of *Forreſt* with the amount thereof, after deducting the ſeveral ſums paid on account of ſuch intereſt and dividends.

Thirdly, that the Maſter has certified, that there remained due from the eſtate of *Forreſt* to the eſtate of *Elwes* the ſum of 6500*l.* for principal upon the ſaid bond, after giving credit for the payments made on account of ſuch principal, and upon the ſuppoſition, that ſuch principal money was originally the ſum of 7170*l.*; whereas no ſum was made payable or ſecured to be paid by the bond: the condition being for replacing the capital or principal ſum of 8000*l.* *South-Sea* Stock with intereſt, as therein mentioned; and therefore the eſtate of *Forreſt* ought to be charged only with ſuch ſum of money as or by way of principal as will be ſufficient for repurchaſing or replacing the ſaid principal ſum of 8000*l.* *South-Sea* Annuities, when the ſame may be ſo repurchaſed, or at ſome given period of time, after deducting the ſeveral ſums of money paid on account of the bond.

The firſt exception was given up by the plaintiffs.

Attorney General and Mr. Stanley in ſupport of the exceptions.— This is a very ſingular bond. It is difficult to inſiſt upon its being uſurious; and I muſt admit 5*l. per cent.* muſt be paid for ſome period. But the Maſter has conceived, that after the expiration of ſix months this bond became a ſecurity, not for replacing the ſtock, but for repayment of the principal money. The true reſult of the contract is, that 5*l. per cent.* ought to be paid for ſix months from the date of the bond; that then that act, which the obligee had a right to have done at the end of the ſix months, ought to be conſidered as done; and that by paying intereſt at the rate of 5*l. per cent.* to the end of the ſix months, replacing the ſtock, and paying the amount of the dividends, that would have accrued from the end of the ſix months, till the ſtock is replaced, the account will be properly ſettled.

The next propoſition, which is the ground of the third exception, if the ſecond fails, is, that this bond never can be a money bond; and the utmoſt, that can be inſiſted upon by the defendants, is, that upon now replacing this ſum of 8000*l.* Old *South-Sea* Annuities and paying intereſt upon the ſum of 7170*l.* at the rate of 5 *per cent.* from the date of the bond to the time of replacing the ſtock it will be right. If the ſtock had riſen above *par* in the courſe of the ſix months, Mr. *Elwes* could have filed a bill at the end of that period, inſiſting upon a re-transfer; which would have put the riſe in his pocket. If that is ſo, the converſe follows; and, if the ſtock falls, he muſt bear the loſs. It is the riſk, with reference to which he makes the contract. It can only be conſidered as not an uſurious bargain in reſpect of that contingency; that intereſt at the rate of 5 *l. per cent.* being paid to the end of the ſix months, Mr. *Elwes* would then have a right to a retranſfer, though the ſtock had riſen, merely becauſe he was ſubject to the riſk of the ſtocks lowering. The whole he bargained for was, that if intereſt at 5 *l. per cent.* was paid till the ſtock was reſtored, ſuppoſing the ſtock was not reſtored at the end of ſix months, yet he was bound to receive the intereſt, till the ſtock was reſtored, and the ſtock itſelf, when offered to be reſtored. It was very eaſy for him to make the contract in the other way, if it was ſo intended; and then the condition would have been to pay intereſt at 5 *l. per cent.*, till the ſtock was to be reſtored, and, if it was not reſtored at the time to pay the ſum of 7170 *l.* with intereſt at 5 *l. per cent.* But the bond is not in the common form. It does not ſpeak of the payment of a principal ſum of money at the period mentioned, but of the transfer of ſtock, and of that only. There was no period, at which Mr. *Elwes* could have called for the payment of any principal ſum of money.

Mr. Mansfield and Mr. Hart for the Report.—This bargain, to which theſe objections are taken, is nothing more than to take intereſt at the rate of 5 *l. per cent.* upon money lent on bond. What is there unreaſonable in the tranſaction? The lender ſold out ſtock to raiſe the money. Inſtead of ſtipulating for a return of that identical ſum, for which the ſtock was ſold, he requires ſo much ſtock to be replaced at the end of ſix months. If the ſtock had been offered at that time, the condition would have been ſatisfied. No doubt the obligation was mutual; upon the one, to transfer the ſtock; upon the other, to accept it. But does it follow, that at any future time the debtor may relieve himſelf by offering to transfer ſtock, when not of half the value? The mutuality was gone at the end of the ſix months by the breach of the condition by not transferring ſtock at that time; and that condition, which ought to have been fulfilled at the end of ſix months, not being complied with for thirty-three years, the money, the value of the ſtock lent, is to be repaid. The loan was in time of peace, when probably the ſtocks were high. A few years ago it would have been inſiſted, that the money was to be repaid.

The penalty of the bond is the debt at law; from which they could have been relieved only upon fair terms. Part of the money has been repaid; in what manner, does not appear. The conduct of the parties therefore ſhews, that the principal ſum advanced was the ſum due.

Neither is there any ground to ſtop the computation of intereſt at the rate of *5l. per cent.* at the end of the ſix months. The debtor was then bound to transfer ſtock. It would be ſingular, if breaking the condition of the bond he was therefore to be liable to pay leſs intereſt. The ſenſe of the condition is, that the intereſt to be paid is *5l. per cent.* upon the principal ſum.

Attorney General in reply.—If an action had been brought upon this bond, or if an iſſue, *quantum damnificatus*, had been directed; it would depend upon the queſtion, whether the true meaning of it is not a contract to do a particular act. If it is not to be conſidered as done at the end of the ſix months, when it ought to have been done, the Court will at leaſt relieve upon the terms of making compenſation for the damage. This is not the uſual form of a bond, by which money is to be repaid, or ſtock to be reſtored. It is to reſtore a given quantity of ſtock at a given day; and there is nothing compelling the obligor either to pay money or reſtore ſtock on any future day. I muſt admit, that if 7170*l.* had been tendered before the end of the ſix months, and that ſum was not equal to replacing the ſtock, *Elwes* was not bound to receive it. An ordinary bond does not expreſs, that the money is to be paid upon any future day: but the law ſays, it ſhall be a bond for the payment upon any future day.

As to the conſtruction of the parties (*a*), ſome conſignee paid a ſum of money to *Elwes*. Under what circumſtances that payment was made is not known. If therefore it turns upon that, there muſt be an inquiry.

Maſter of the Rolls.—The real queſtion is, whatever has been the Maſter's idea, whether what he has given as a compenſation for the breach of the condition is a fair and reaſonable mode of computing the injury ſuſtained?

(*a*) See *ante*, vol. 3. 298. 694. and *Cooke* v. *Booth*, *Cowp.* 819.

This is in fact a bond for performance of an agreement. Had not Mr. *Elwes* a right to take it into a court of Equity, if he thought fit? Is there any thing unreaſonable in it? In the year 1766 he advanced the ſum of 7170*l.* to Commodore *Forreſt*; who in conſideration of that ſum paid to him undertakes to transfer upon a given day a given quantity of ſtock; which is neither more nor leſs than ſo many annuities redeemable by the public; and he agreed to pay intereſt at the rate of 5*l. per cent.* upon the ſum advanced in the mean time; and for performance of this agreement he gives a bond with a penalty of double the value of the money. He did not perform his agreement. The conſequence is, that at law the penalty is forfeited. It does not appear, whether either the ſtock or the money was ever demanded: but ſome ſums of money have been paid: it is not known, when, or by whom: but by ſome means or other a groſs ſum has been paid; which has left a balance remaining of only 6500*l.* The diſtinct queſtion is, what is the fair meaſure of the damage. Should I do juſtice in giving the ſame annuities, which were then worth more than 89 *per cent.*, and are now much depreciated? It would be ridiculous to ſtate that as a compenſation. Suppoſe an engagement entered into to deliver a ſhip at a certain day in time of war, and the offer is made afterwards, when the war is over: the ſhip might not be ſo good then; and the object, for which it is wanted, might not exiſt (*a*). Suppoſe, a truſtee ſells out ſtock: what is the habit of the Court as to compenſation? The *ceſtuy que truſt* has an option to have either the ſtock, or the money produced by it with intereſt. Why ſhall not the ſame option be given to the obligee in this bond; who has ſuffered by the breach of this agreement? It is certainly not unjuſt; nor do I know a more moderate compenſation for a breach of the agreement by the party with his eyes open than giving back the money with intereſt. It is no more than if it had been a loan. I admit, it is not a loan: but the defendants ſay, they are willing to accept the money with intereſt. The Maſter has thought that fair; and I do not know, how a jury could adopt a better rule. If an action had been brought recently upon

The time, at which a contract is to be performed, material.

Truſtee of ſtock ſells it: the *ceſtuy que truſt* has an option to have the ſtock or the produce with intereſt.

In an action recently after breach of an agreement to transfer ſtock the riſe, if any, would be given in demages.

(*a*) As to the materiality of the time with reſpect to the performance of agreements, ſee *Lloyd* v. *Collet*, 4 *Bro. C. C.* 469. Mr. *Sanders*'s note to *Gibſon* v. *Paterſon*, 1 *Atk.* 12. and *Harrington* v. *Wheeler*, *poſt*.

the breach of the agreement, and the ſtock had riſen; no doubt, the jury would by way of damages have given the riſe, and would not have confined it. That would be injuſtice the other way. The regular way would be an iſſue, *quantum damnificatus*; upon which the Judge would ſay, they might have demanded more, and cannot have leſs. It is a fair compenſation upon the whole.

The exceptions were overruled.

March 9th. *April* 8th.

Legacy to a father the better to enable him to provide for his younger children: he conſented to ſecure the capital; but was held entitled to the intereſt.

BROWN *v.* CASAMAJOR.

Charles De Laet by his will, dated the 18th of *May* 1792, charged the reſt and reſidue of all his real and perſonal eſtates with the ſum of 1000*l.*; which he gave to *Humphry Sibthorp*; declaring it to be given to replace the 1000*l.* depoſited in the teſtator's hands at the time of *Sibthorp*'s marriage; and which at times he had nearly had back; and directing, that a releaſe be given by the ſurviving truſtee in his marriage ſettlement for the ſame; and that the ſaid 1000*l.* be paid and applied for that purpoſe. The teſtator then proceeded thus:

"I alſo give to the ſaid *Humphry Sibthorp* the further ſum of "7000*l.* the better to enable him to provide for his younger "children; and if he ſhould depart this life before or I be "rendered incapable in caſe of accident to make any alteration, "then I give the ſaid ſum of 7000*l.* to *Suſanna Sibthorp* his "wife for the purpoſes aforeſaid; and if both of them ſhould die "before me, I give the ſame among the younger children."

The teſtator made the following codicil:

"I think Mr. and Mrs. *Sibthorp*'s mourning is omitted. I "mean they ſhould have 50*l.* a-piece that their whole de-"mand under the will is not to exceed 8100*l.* *C. D.* 18th "*May* 1792."

Upon

1799.
BROWN
v.
CASAMAJOR.

Upon the death of the teſtator three letters were found, bearing the ſame date as the will, ſigned by the teſtator, and directed to each of his executors; declaring, that the incloſed paper will ſhew the ſeveral legacies in his will, and the courſe and order, as well as the amount, in which they may be paid.

The incloſed paper was ſigned by the teſtator, and intitled "A liſt of the legacies in my will." That liſt contained the following article:

" In the whole together { *Suſanna Sibthorp* / *Humphry Sibthorp* } 8100"

The ſum of 1000*l.* referred to in the will, as having been depoſited with the teſtator upon *Sibthorp*'s marriage, was ſettled upon his children. He had five younger children.

By the decree made in 1794, eſtabliſhing the will, the accounts were directed.

The Maſter by his Report ſtated, that he had computed intereſt from a year after the death of the teſtator upon all the legacies except the legacy of 7000*l.*; and he ſubmitted to the Court, how the defendant *Humphry Sibthorp* and his younger children were entitled as well to the intereſt as to the principal of that legacy.

By the decree made on the 9th of *March* 1799 when the cauſe was heard for farther directions by the Maſter of the Rolls, ſitting for the Lord Chancellor, it was directed, that, the defendant *Humphry Sibthorp* by his Counſel conſenting to ſecure the ſum of 7000*l.*, given by the will the better to enable him to provide for his younger children, the ſaid defendant ſhould lay propoſals before the Maſter for ſecuring the ſaid ſum of 7000*l.* for the benefit of his younger children; with liberty for any ſuch children upon attaining their reſpective ages of twenty-one years to apply to the Court concerning their reſpective intereſts in the ſaid ſum of 7000*l.*

No directions having being given as to the intereſt accrued and to accrue upon the ſaid ſum of 7000*l.*, Mr. *Sibthorp* preſented a petition; praying, that it may be declared, that ſuch ſecurity to be given by the petitioner for the ſaid ſum of 7000*l.* is to be without intereſt; and that the petitioner is entitled to the intereſt already accrued due thereon for his own uſe and benefit.

The Lord Chancellor ſaid, he rather thought, the petitioner was entitled to receive the intereſt; and that, the intereſt being ordered to be paid to him, the ſecurity would be taken only for the groſs ſum of 7000*l.*

The order was, that ſo much of the intereſt upon the ſaid ſum of 7000*l.* from the end of a year after the death of the teſtator as had not been paid be paid to the defendant *Humphry Sibthorp.*

END OF THE SITTINGS AFTER HILARY TERM.

Eaſter Term,

39 Geo. 3. 1799.

LUDERS *v.* ANSTEY.

April 12. 15.

Settlement decreed according to a letter previous to the marriage; though no expreſs aſſent: the marriage having taken place immediately, a diſtinct, poſitive, diſſent would be neceſſary to prevent the effect of the letter; and that could be evidenced only by an actual ſettlement before marriage.

Conſtruction as to veſting, in what children, and when;—and as to the ſubject, upon which the ſettlement was intended to attach.

By indentures, dated the 10th of *July* 1776, previous to the marriage of *William Light* and *Lucretia Luders*, the fortune of *Lucretia Luders*, amounting to the ſum of 3000*l.* was veſted in truſtees, upon truſt after the marriage to permit *William Light* and his aſſigns to receive the intereſt during his life; and after his deceaſe to permit the ſaid *Lucretia* and her aſſigns to receive the intereſt during her life; and after the death of the ſurvivor in truſt for the children of the marriage, as therein mentioned; and in conſideration of the ſaid ſettlement of the ſum of 3000*l.* and for making a further proviſion for the ſaid *Lucretia*, it was declared, that in caſe the marriage ſhould take effect, and the ſaid *Lucretia* ſhould ſurvive *William Light*, ſhe would be entitled to dower at common law out of his real and perſonal eſtate; and if ſhe ſhould ſurvive him, ſhe ſhould receive 14,000*l.* at leaſt within ſix months after his deceaſe as and for her ſhare of his perſonal property; and for the better ſecuring the ſame *William Light* covenanted, that if the ſhare of his perſonal eſtate in *England* at the time of his death, which the ſaid *Lucretia* ſhould be entitled to receive, ſhould not, when reduced into money, amount to 14,000*l.*, then his heirs, executors or adminiſtrators, ſhould within ſix months after his deceaſe pay to her ſo much money as with what ſhe would be entitled to receive as her ſhare of his perſonal eſtate in *England* would make up the full ſum of 14,000*l.*; and it was declared, that the ſaid covenant ſhould not be conſtrued to confine her ſhare of his perſonal eſtate to the ſum of 14,000*l.*, or to prevent her receiving any larger ſum, in caſe her ſhare in ſuch perſonalty, (whether in *England* at the time of his deceaſe, or afterwards remitted,) as his widow, ſhould appear to amount to any larger ſum: but only to ſecure to her in all events the ſaid ſum of 14,000 *l.* within ſix months after his deceaſe; and in caſe his perſonal property, which ſhould be in *England* at his death, ſhould not be ſufficient to afford the ſaid ſum of 14,000 *l.* as her ſhare, his heirs, executors, *&c.* ſhould in purſuance of the covenant be obliged to advance a ſum ſufficient to make up her ſhare the full ſum of 14,000 *l.*; and if any other part of his property ſhould afterwards be remitted or come to *England* from the *Eaſt Indies*, then the ſaid *Lucretia*, her executors, adminiſtrators and aſſigns, ſhould be entitled to receive her widow's ſhare only out of the ſurplus of the monies ſo remitted after a deduction of the money advanced to make up the ſum of 14,000 *l.*; and it was declared, that any future eſtate coming to the ſaid *Lucretia* ſhould be ſettled upon the ſame truſts as the ſaid ſum of 3000 *l.*

William Light died in 1784 inteſtate; leaving his wife *Lucretia* and four children by her ſurviving. His widow took out letters of adminiſtration to him.

In *November* 1786 a bill was filed by *George Stratton* on behalf of himſelf and all other creditors of *William Light* againſt his widow and her brother *Alexander Luders*, one of the truſtees in her marriage ſettlement, who had alſo acted as agent to his ſiſter in the management of her property; praying an account of the debts; and that the ſettlement may be declared fraudulent and void as againſt the creditors.

Lucretia Light by her anſwer inſiſted, that the perſonal eſtate of *William Light* remaining in her hands unadminiſtered did not amount to the ſum of 14,000 *l.*; and that ſhe ought to be conſidered as a ſpecialty creditor for that ſum with intereſt in preference to the other creditors.

In *April* 1791, before any decree was made in that cauſe, *Lucretia Light* married *Robert Anſtey*. No ſettlement was made previouſly to that marriage: but by bonds, dated the 19th of *April* 1791, and executed after the marriage, *Robert Anſtey* became bound to *Alexander Luders* and to *John Anſtey* and *Arthur Anſtey*, brothers of *Robert Anſtey*, in the penal ſum of 10,000 *l.*; with a condition, reciting the marriage; and that *Robert Anſtey* was deſirous of fulfilling a promiſe, which he had made to the ſaid *Lucretia* before his marriage with her, of making ſome proviſion for her out of the fortune, to which he had become entitled in right of his ſaid wife, claiming under *William Light*, her late huſband, or any of the covenants in the ſettlement made upon her marriage with him, and alſo for her four children by that marriage, *William Stratton Dundas Light*, *Alexander Whalley Light*, *Lucretia Light*, and *Henry Light*, upon condition, that they ſhould not receive or claim any part of the eſtate or effects of their late father from his adminiſtratrix under the *Statute of Diſtributions*; but the affairs of *William Light* being then unſettled, and *Robert Anſtey* being then under orders to leave this country immediately to join his regiment in *India*, he was willing in the mean time to enter into the ſaid bonds, it was declared, that the ſaid bonds ſhould be void, if *Robert Anſtey*, his executors or adminiſtrators, ſhould by a proper inſtrument or inſtruments pay, aſſign, or make over, to *Alexander Luders*, *John Anſtey*, and *Arthur Anſtey*, one full clear moiety or half part of what ſhould appear to be the clear ſurplus of the eſtate and effects of the ſaid *William Light* deceaſed, not including diamonds, jewels, rings, ornaments of the perſon, and wearing apparel, after full payment and ſatisfaction of all the debts, charges, obligations, or other incumbrances, affecting ſuch eſtate and effects, other than the covenant or covenants in the ſettlement made upon the ſaid *Lucretia* by *William Light*, alſo after payment and ſatisfaction or allowance of all coſts, damages and expences, which had at any time before or might at any time after be incurred in any ſuit or ſuits either in law or equity already inſtituted, or which had been or might be inſtituted, reſpecting the eſtate and effects and affairs of the ſaid *William Light*, whether the ſame or any part thereof might have been paid by or by the order of the ſaid *Lucretia* before her ſaid marriage out of her own private money, or might be paid by *Robert Anſtey* hereafter out of his own private money or out of any part of the eſtate of *William Light*, and alſo after payment and ſatisfaction of every other expence, that might be incurred in the ſettlement or arrangement of the affairs of the ſaid *William Light* either in *England* or elſewhere; upon truſt with the conſent of *Robert Anſtey* during his life and after his death of *Lucretia*, his wife, in caſe ſhe ſhould ſurvive him, to inveſt the whole amount thereof in Government or real ſecurities at intereſt, and to ſtand poſſeſſed of the ſtocks, funds or ſecurities, upon the truſts after declared: that is to ſay; upon truſt to pay to and empower *Robert Anſtey* and his aſſigns to receive the intereſt for his life; and after his death to pay to or empower *Lucretia*, his wife, in caſe ſhe ſhould ſurvive him, to receive the ſame for her life; and after the death of the ſurvivor of them upon truſt to pay, aſſign, or make over, the principal of ſuch ſtocks or ſecurities equally to and among ſuch of her children by *William Light*, as ſhould be living, or be married, at the death of the ſurvivor of *Robert Anſtey* and his ſaid wife, or ſhould have been married, and be then dead, leaving a child or children ſurviving, or born in due time afterwards: but if any of the ſaid children of *William Light* ſhould die under age, not being married, or having been married and not leaving a child or children ſurviving, as aforeſaid, or born in due time afterwards, then the part of him or her ſo dying is not to ſurvive to the others or other of them, but to go to their repreſentatives reſpectively according to the *Statute of Diſtributions*; and, if all of the ſaid children ſhould die before the ſurvivor of *Robert Anſtey* and *Lucretia*, his wife, under age and unmarried, or, having been married, without leaving a child or children ſurviving, as aforeſaid, or born in due time afterwards, then upon truſt to pay, aſſign, and make over, the ſaid principal unto the ſurvivor of *Robert Anſtey* and *Lucretia*, his wife, his or her executors, adminiſtrators, and aſſigns; and which ſaid inſtrument or inſtruments ſhould contain powers to the truſtees for changing the ſecurities, and for the other purpoſes therein mentioned: and particularly a proviſo or condition, (as may be moſt adviſable,) that before any of the ſaid children, or any perſons claiming through them ſhould become entitled to receive any benefit under the bonds and the inſtruments to be made in purſuance thereof, they and each of them ſhould execute to *Robert Anſtey*, his heirs, executors, and adminiſtrators, and to *Lucretia*, his wife, her heirs, executors, and adminiſtrators, in caſe ſhe ſhould ſurvive him, or to ſuch other perſons, as ſhould be entitled, general releaſes, diſcharging them and the eſtate of *William Light* from all claims or demands whatſoever: but ſuch proviſo ſhould not be intended or worded ſo as to deprive any child or children of the ſaid children of *William Light* (ſurviving their reſpective parents) from claiming the intereſt of the ſhare of their deceaſed parents during their infancy: but if *Robert Anſtey* at the requeſt of the truſtees ſhould not execute ſuch proper inſtrument agreeably to the condition, the bond was to remain in full force: and it was declared, that no part of the private eſtate and effects of *Robert Anſtey* (nor the diamonds, jewels, *paraphernalia*, or other aricles therein before excepted) ſhould be liable to or bound by the ſaid bonds, but only the full and clear moiety of the ſurplus of the eſtate and effects of *William Light* after full payment, ſatisfaction and allowance, of all the debts, charges, incumbrances, loſs, coſts and expences, therein before expreſſed, and thereby intended to be paid, ſatisfied, and allowed, thereout.

By the decree, made on the 22d of *July* 1791 in the cauſe of *Stratton* v. *Anſtey*, the bill, ſo far as it ſought to ſet aſide the deed, dated the 10th of *July* 1776, was diſmiſſed with coſts; and it was referred to the maſter to take an account of the debts due to the plaintiffs, and of the perſonal eſtate of the inteſtate *William Light* come to the hands of *Robert Anſtey*, and his wife, and of *Alexander Luders*; who by his anſwer admitted, he had received part; and it was directed, that the perſonal eſtate ſhould be applied in payment of the debts and funeral expences of the inteſtate in a courſe of adminiſtration.

By deed of releaſe, dated the 23d of *October* 1793, reciting, that *Alexander Luders* had applied all the perſonal eſtate of *William Light*, that came to his hands, except 680*l.* *Eaſt-India* ſtock and 700*l.* 4 *per cent.* Bank Annuities, *Robert Anſtey* agreed to indemnify *Luders* againſt all demands on account of the ſuit of *Stratton* v. *Anſtey*; and *Luders* covenanted, that, as ſoon as he ſhould be diſcharged from that ſuit, he would transfer the ſaid ſtock to *Robert Anſtey*: the ſame having been laid out by him as part of the ſum covenanted by *William Light* to be paid for the benefit of *Lucretia Anſtey*.

Lucretia Anſtey died in *April* 1794, having had only one child by her ſecond marriage; who died an infant. *Robert Anſtey* took out letters of adminiſtration to her; and *Alexander Luders* obtained letters of adminiſtration *de bonis non* of *William Light* during the minority of his children.

The bill was filed by *Alexander Luders* and the four infant children of *William Light* againſt *Robert Anſtey* and his two brothers; praying an account of all ſums of money, ſecurities and other perſonal eſtate, which the defendant *Robert Anſtey* had at any time poſſeſſed or received in right of his late wife, and of all ſums of money in the funds, ſecurities, and other perſonal eſtate, (except jewels, rings, ornaments of the perſon, and wearing apparel) in the poſſeſſion or power of *Lucretia Anſtey* at the time of her marriage with *Robert Anſtey*, which ſhe claimed to be entitled to, or had poſſeſſed, or received as adminiſtratrix of, or otherwiſe under, *William Light*, or as part of his perſonal eſtate or the produce thereof; and an account of all the perſonal eſtate of *William Light*, except as aforeſaid, received by *Robert Anſtey* and *Lucretia*, his wife, during ſuch ſecond coverture; and that all ſuch perſonal eſtate or the ſecurities, *&c*, may be transferred to the Accountant General; and that the property or fortune of the late *Lucretia Anſtey* may be ſettled according to the terms of a letter dated the 17th of *April* 1791, mentioned in the bill: but if it ſhould appear to the Court, that the defendant *Robert Anſtey* is not bound to make a ſettlement according to the terms of ſuch letter, then that he may be compelled to make a ſettlement of one moiety of the monies retained by him and *Lucretia*, his wife, towards ſatisfaction of the covenant in the ſettlement, dated the 10th of *July* 1776, or which ſhall hereafter be paid or payable in reſpect thereof, and alſo one moiety of the clear reſidue, if any, of the perſonal eſtate and effects of *William Light*, upon the truſts of the ſaid bonds for the benefit of the infant plaintiffs according to their reſpective rights and intereſts therein, and that ſuch farther parts of the reſidue of the perſonal eſtate of *William Light*, as the plaintiffs, the infants, reſpectively may appear entitled to or intereſted in, may be applied or ſecured for their benefit; and that *Robert Anſtey* may be reſtrained from commencing any action againſt the plaintiff *Luders* to compel the transfer of 680*l.* *Eaſt India* Stock, and 700*l.* 4 *per cent.* Bank Annuities.

The bill charged, that it would appear, how much of the perſonal eſtate of *Light* is applicable to the ſettlement, if the defendant *Robert Anſtey* would account for the perſonal eſtate received by him in right of his wife; that the ſaid *Eaſt India* Stock and Bank Annuities form part of the fortune of *Lucretia Anſtey*; and ought to be ſettled according to the letter of the 17th of *April*; and that the defendant had received other parts of her fortune to a much greater amount than he is entitled to; and therefore the

dividends

dividends of the ſaid ſtock ought to be ſecured for the benefit of the infant plaintiffs.

There being no evidence in the cauſe, it reſted upon the anſwers of *Robert Anſtey* and *Arthur Anſtey*. The Lord Chancellor ſaid, he ſhould conſider the latter as if he had been examined as a witneſs.

The letter repreſented by the bill as the proper baſis of the ſettlement was written by *Robert Anſtey* from *London* to *Lucretia Light* at *Bath*; and was dated *Sunday* the 17th of *April* 1791. It appeared to be in anſwer to objections, that had been made by Mrs. *Light* to Mr. *Anſtey*'s propoſals of marriage on account of the difference of their ages, and of her children, and the danger of leaving them unprovided. Mr. *Anſtey* in that letter diſclaims all idea of her fortune; and declaring, that he only wiſhes to call her his, ſolicits her to conſent to a marriage previous to his then intended departure for *India*. He repreſents, that his allowance, while he remains there, will be near 1000*l. per annum*; ſo that ſhe in no reſpect need curtail her expences during his abſence; that at his return he ſhall have between 3 and 400*l.* a-year. The letter then proceeds thus:

"In caſe of an addition to your family afterwards I have pro-
"poſed that one-third of your fortune ſhould go to them: ſecure
"one to your preſent children: ſhould the number of the latter be
"more than your former, divide the two-thirds in ſuch manner
"as to make all equal; and in the event of our deaths divide the
"other third amongſt them all. One third with the addition of my
"own income and what my father will give me, which conſider-
"ing the number of his children will be handſome, I am confident
"we ſhall be able to live on very comfortably and as much to
"your happineſs and pleaſure as at preſent."

Then adverting to an avowal ſhe had made in a letter to him, that did fortune permit her to do it, ſhe would make a determination in his favour, he aſks, "Why will it not? Conſider the "propoſals I have made above. I am convinced you will find it "will."

Robert Anſtey was at this time Captain in a regiment ſerving in the *Eaſt Indies*, and being under orders to join his regiment, and intending not to marry previouſly to his departure, he had taken leave of his friends; and his baggage was on board the ſhip; which was then in daily expectation of ſailing: but finding, there was a probability of a ſhort delay, he went to *Bath* on the 20th of *April* for the purpoſe of marrying Mrs. *Light.* He arrived there early in the morning of the 21ſt; when, after they had met, and juſt before they were going to be married, he ſent to his brother *Arthur Anſtey*, requeſting a meeting; and upon his coming *Robert Anſtey* mentioned, that he and *Lucretia Light* were then immediately going to be married; and he requeſted his brother to accompany them to church for the purpoſe of giving her away: but *Arthur Anſtey*, as ſoon as he was informed by *Robert Anſtey*, that his intention of marrying Mrs. *Light* was unknown to his father and every other part of his family, declined attending them to church; and ſoon afterwards went away; having firſt ſuggeſted to his brother the propriety of his making ſome ſettlement on or proviſion for his intended wife and her children by her former huſband: in anſwer to which *Robert Anſtey* ſaid, there was not then time for making a ſettlement or proviſion for them: but he aſſured his brother, that after his marriage and before he ſhould leave *England* he would make any ſettlement or proviſion, which *Arthur Anſtey* ſhould think right and proper; and would do whatever he thought, that as a man of honour he ought to do in that reſpect.

A few hours after the marriage Captain and Mrs. *Anſtey* and Mr. *Arthur Anſtey* went to *London*; where a negotiation took place between Mr. *Arthur Anſtey* and Mr. *Luders*; in conſequence of which the bonds were prepared by the former, who ſoon returned with his ſiſter-in-law to *Bath*, in order to arrange her affairs previouſly to her quitting *England*; *Robert Anſtey* being either at *London* or *Graveſend*.

When the bonds were ready, *Arthur Anſtey* and *Lucretia Anſtey* ſet out from *Bath* for *London*. *Robert Anſtey* met them in their way; and being much preſſed for time from the apprehenſion of loſing his paſſage he executed the bonds in a carriage on the road.

Robert Anſtey by his anſwer ſtated, that according to the beſt of his knowledge, remembrance, and belief, no letter paſſed between him and his wife, nor did he write any letter to her, previous to his marriage concerning any propoſed or intended ſettlement, except the letter of the 17th of *April*; that the propoſal therein made with reſpect to a ſettlement or proviſion was never aſſented or agreed to, or even in any manner anſwered, noticed, or alluded to, by her in any of her letters to him from the time of his writing that letter to the time of his executing the bonds: nor were the bonds made in conſequence, purſuance or contemplation of, ſuch letter, nor with any reference thereto: nor was there any promiſe or agreement relative to a ſettlement or proviſion ever made by him and *Lucretia*, or by him to any one on her behalf, before the marriage.

The anſwer alſo ſtated, that the defendant was willing to ſettle according to the bonds: but the plaintiff inſiſted, that according to the terms of the bonds the defendant is bound to ſettle a moiety of the fortune of *Lucretia Anſtey* at the time of the death of *William Light*. The defendant inſiſts, he is bound to ſettle a moiety of the fortune at the time of his marriage, and not at any other time.

The anſwer further ſtated, with reference to the recital in the deed, dated the 23d of *October* 1793, that *Lucretia Anſtey* had for the benefit of her children previouſly to her marriage with the defendant conſented and agreed to take only a life eſtate in certain ſums therein mentioned, and that all the parties thereto were deſirous to confirm the ſaid agreement, that no ſuch agreement was made; and that the ſaid recital appears to the defendant to be an interlineation in the draft; and he cannot conceive any other reaſon for it, except that the plaintiff *Luders* might ſuggeſt it, in order to guard the ſettlement of the terms therein mentioned or alluded to from any queſtion, that might be made as to its validity againſt any creditors of the defendant; and he inſiſted, that theſe circumſtances afford ſtrong preſumptive evidence, that the recital in the condition of the bonds could only have been inſerted with a view to guard the ſettlement thereby provided againſt any ſuch queſtion.

The anſwer charged the plaintiff *Luders* with keeping his ſiſter in the dark as to the account of her fortune and making uſe of it;

and ſtated, that he had not given the defendant any ſatisfactory account; that *Lucretia Anſtey* frequently declared, ſhe was much diſſatisfied, and thought, ſhe was worth more: that the releaſe was executed, in order to prevent the plaintiff's departing from a verbal agreement with his ſiſter to take equal intereſts after the death of their mother in the property, which ſhe enjoyed for life, and to avoid any diſpute, and to be upon a friendly footing; but not upon a conviction, that the accounts were clear.

The defendant *Arthur Anſtey* by his anſwer ſtated, that upon his arrival in *London* with his brother and ſiſter after the marriage, at her requeſt, and with a view of prevailing upon the plaintiff *Luders* to ſee her, and to conſult with him reſpecting the meaſures, which it might be moſt adviſeable to take in order to fulfil *Robert Anſtey*'s promiſe to this defendant of making ſome proviſion for *Lucretia Anſtey* and her children by her former marriage, this defendant requeſted an interview with the plaintiff *Luders*; which at length took place; when the defendant acquainted *Luders* with the purport of the converſation, which paſſed between him and his brother at *Bath* reſpecting a ſettlement; and that his brother had left it to him to arrange the terms: but no meaſures were then taken.

Upon the defendant's return to *Bath* with his ſiſter ſeveral meetings upon the ſubject took place between the plaintiff *Luders* and him. The defendant at firſt propoſed to ſettle for the benefit of *Lucretia Anſtey* and her children by her former huſband one third of the fortune, to which ſhe was then entitled out of the eſtate of her former huſband; and the plaintiff eagerly acceded thereto, and expreſſed himſelf highly ſatisfied therewith: but the defendant, in order that he might manifeſt his brother's ſincere wiſh and intention, as expreſſed to him, to do every thing, that was handſome towards the children of the former marriage, as far as might be conſiſtent with making a due proviſion for the children of the ſecond marriage, took upon himſelf afterwards to propoſe to ſettle one half, inſtead of a third only, of her ſaid fortune, and to ſettle the other moiety thereof for the benefit of *Robert Anſtey* and *Lucretia*, and the children of their marriage, if they ſhould have any; and that the plaintiff not only expreſſed his conſent and approbation of that propoſal, but declared, that ſuch ſettlement of a moiety upon the children of the firſt marriage was highly ſatisfactory to him, and perfectly honourable and liberal on the part of the defendant. *Lucretia Anſtey* was not preſent at theſe meetings: but the defendant communicated to her from time to time upon the ſubject of the intended ſettlement; and ſhe expreſſed herſelf highly ſatisfied and pleaſed with the arrangement.

The anſwer ſtated, that, there not being time to prepare a regular deed of ſettlement, it was agreed between the plaintiff and the defendant *Arthur Anſtey*, that bonds ſhould be executed by *Robert Anſtey*, conditioned for making the ſettlement agreed on; and the defendant *Arthur Anſtey* at the requeſt of the plaintiff drew drafts of the conditions of ſuch bonds; and ſeveral conferences took place between them upon the ſubject in the courſe of drawing the drafts; and they went through them together.

The anſwer further ſtated, that the recital contained in the condition of the bonds of *Robert Anſtey*'s being deſirous of fulfilling the promiſe he made to the ſaid *Lucretia* before his marriage with her of making ſome proviſion for her was interlined in the original draft of the ſaid bonds in this defendant's handwriting, and is a variation in the form of the draft, as originally worded by the defendant; and for the reaſon hereinafter given the defendant is convinced and verily believes, ſuch interlineation or variation was not made or conſented to on the part of the defendant from the idea, that *Robert Anſtey* had actually made any ſpecific promiſe to *Lucretia Anſtey* before his marriage, or any propoſal, offer or promiſe whatſoever, other than the promiſe made by him to this defendant on the morning of the marriage; and in particular, that the ſaid recital did not, nor could, bear any relation to the propoſal, overture, or ſuggeſtion, in the letter of the 17th of *April* 1791: nor could ſuch letter be in the contemplation of either the plaintiff or the defendant, when the ſaid bonds were prepared, becauſe neither he, nor, as he believes, the plaintiff, then knew of any ſuch letter having been written by *Robert Anſtey*, nor of his having ever made any ſuch propoſal.

The defendant *Robert Anſtey* did not read the bonds; nor were they read to him: but he was informed by his brother generally of their contents; upon which, as ſoon as he underſtood, that the plaintiff and Mrs. *Anſtey* were ſatisfied, he executed them immediately: nor did he know more of their contents than by that general information, till after he and Mrs. *Anſtey* had arrived in *India*; when he received copies of them.

Solicitor General and Mr. Cox for the plaintiffs made two points: Firſt, that the letter of the 17th of *April* 1791 muſt be the baſis of the ſettlement:

Secondly, that the ſubject of the ſettlement was the fortune of Mrs. *Anſtey*, as it exiſted at the death of her firſt huſband; as to which they relied upon the proviſion in the bonds for payment of all coſts and expences, which had been or might be incurred reſpecting the affairs of *William Light*.

LORD CHANCELLOR.—I do not ſee, how it is poſſible to avoid making the letter the baſis of the ſettlement: Mr. *Anſtey* having inſtantly followed the letter: and the marriage having taken place immediately.

This is a very important caſe; and the old caſes in *Equity Caſes Abridged*, and particularly *Cooks* v. *Maſcall* (*a*) are not near ſo ſtrong.

The phraſe of this letter is very ſtrong. It purports to be an anſwer to objections made by her to the marriage; which he endeavours to obviate: firſt, as to his age: ſecondly, it is evident, ſhe had objected, that after doing what ſhe was in duty bound to do towards her exiſting children, they would not have enough to live upon. To theſe objections he makes this anſwer; and the phraſe is "*I have propoſed.*" He refers to it as a foregone propoſal in ſome converſation between them. Therefore upon his part this letter contains a ſpecific and complete arrangement of their money affairs; and upon this letter the marriage took effect. The only concluſion I can now draw is, that this ſatisfied all her objections; and ſhe married.

Mr. Manſfield Mr. Richards and Mr. Alexander for the defendants. The propoſal by that letter never was agreed to, or in any manner noticed, by Mrs. *Anſtey*; and the anſwer of *Arthur Anſtey* ſhews, the bonds could have no relation to that letter. The letter was not known either to him or the plaintiff. The

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(*a*) 2 *Vern.* 210. 1 *Eq. Ca. Abr.* 22.

recital of the previous promiſe was merely inſerted by interlineation on account of creditors; the ſettlement being after marriage. *Arthur Anſtey*, who prepared it, frequently conferred with Mrs. *Anſtey* upon the ſubject. Both ſhe and her brother approved of it. The propoſal in the letter, to ſettle her whole fortune, reſerving for themſelves only the intereſt of one third for their lives, is very abſurd; and there is a previous condition, upon which the whole depends. The letter was not put into the hands of a truſtee or a friend, but was preſerved by mere accident, and was found among Mrs. *Anſtey*'s letters after her death. It was not kept with a view to any tranſaction, that was to ariſe upon it. It is evident from her aſſenting to the terms of the bonds, that ſhe did not conſider her property to be bound by the letter. Unleſs it can be raiſed to an agreement binding her equally, it cannot bind the defendant. It is to be obſerved, that the letter was written on *Sunday*; and therefore could not have been put into the poſt until the next day; and on *Wedneſday* the defendant went to *Bath*.

If the ſettlement is to be made according to the letter, the defendant is entitled to one third in right of the deceaſed child, and to the intereſt of another third for his life, and a ſhare of that third alſo in right of the deceaſed child.

Upon the other queſtion, the recital of the bonds ſhews, that nothing more than a moiety of the then exiſting fortune of Mrs. *Light* was to be ſettled. Other words would have been proper, if the intention was to ſettle a moiety of the whole fortune, that ever exiſted, as has been contended upon the proviſion for payment of all coſts and expences, that had been or might be incurred in any ſuit reſpecting the affairs of *William Light*: but thoſe are only general words. All the fortune, that ever exiſted, cannot be intended.

LORD CHANCELLOR.—The account to be taken in this cauſe will not be of the eſtate of *William Light*, but of how much the defendant *Robert Anſtey* received in right of his wife. In order to have that aſcertained an account of *Light*'s aſſets muſt be taken in the other cauſe.

I think, the bond having eſtabliſhed, that it was intended to be for the purpoſe of fulfilling a promiſe made before marriage, and a written promiſe before marriage being preſerved, upon which without more the marriage took place, I muſt bind him by that (*a*). I muſt take the fact, as *Arthur Anſtey* ſtates it; that his reaſon for inſerting the recital was his recollection of the promiſe his brother made to him. It is requiring a good deal of me, when he recites a promiſe, that I ſhould give him credit for not knowing the contents of the letter. I do not mean to impeach the credit due to both the anſwers: but upon the face of the writing here is a bond, with the defendant's name to it, reciting a promiſe before marriage; and there is a promiſe made before marriage.

But I will put that out of the caſe; for if the bond had never exiſted, and the marriage had taken place upon the letter without farther communication, in favor of *Light*'s children or the children of this marriage I ſhould have held them bound; and that the defendant *Robert Anſtey* was clearly bound by this engagement. She marries upon this engagement. Suppoſe, there were children of this marriage, it is impoſſible to ſay, both the father and mother would not be bound; though it was only her fortune. There is no *locus pœnitentiæ* in this caſe; and I ſhould require a poſitive, diſtinct, diſſent; and that could not be evidenced by any thing but an actual ſettlement before marriage varying from that. Certainly it was a reaſonable, proper, and perfectly right, ſettlement. It is clear, the embarraſſment as to the difficulty ſhe found of leaving the children, ſhe then had, unprovided, was one obſtacle to the marriage. They were referred to by Mr. *Anſtey* in the letter in terms of affection. Her anxiety was removed by that propoſal; which according to the letter had been the object of previous communication; and of which he ſpeaks in a manner, that would bind him; and in conſequence the marriage took place. So that I do not lay much ſtreſs in ſupport of the decree upon the bond having this recital in it. I really believe what is ſaid in the anſwer of *Arthur Anſtey* as to the recital in the bond; though it

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(*a*) The counſel for the defendant here obſerved, that *Arthur Anſtey*, whom the Lord Chancellor had ſaid he ſhould conſider as a witneſs, proved, that the bonds were not made in conſequence of any promiſe except the verbal promiſe made to him juſt before the marriage.

is very difficult for the Court to conclude againſt the written inſtrument.

I rather think, the defendant is entitled to one third of the fortune in right of his child, who is dead. The meaning of the letter is very clear. Upon the ſuppoſition, that there would be more than four children, he did not intend, that his children ſhould be worſe off than thoſe by the firſt marriage. That would make it neceſſary to throw the two thirds together into one fund, and divide it equally.

Therefore decree a ſettlement to be executed, to carry into effect the terms of the letter, dated the 17th of *April* 1791. For that purpoſe let an account be taken of the fortune, which Mrs. *Anſtey* was poſſeſſed of or entitled to at the time of her marriage with the defendant. Declare, that the defendant *Robert Anſtey* is entitled to one third; that one third belongs to the children of the firſt marriage now; and that the defendant is entitled to the intereſt of the other third for his life; and that he is alſo entitled to a fifth of the capital of that third; and that the remaining four fifths, ſubject to the defendant's intereſt for life, belong to the plaintiffs, the children of *William Light*.

Let an account be taken of the perſonal eſtate of *William Light*, being the property of *Lucretia Light*, come to the hands of the plaintiff *Luders*.

Refer it to the ſame Maſter, to whom the other cauſe is referred; and reſerve the conſideration of further directions.

FRANCO *v.* FRANCO.

Rolls.
March 13.
April 11. 15.

JOSEPH FRANCO, carrying on buſineſs at *Liſbon*, by his will, dated the 31ſt of *March* 1772, directed, that immediately after his deceaſe his teſtamentary executors ſhould diſcontinue his

Bill by huſband for ſtock held in truſt for his wife: a claim was ſet up under a bond by the wife and her former huſband, ſecuring an annuity out of the dividends, as an aſſignment for valuable conſideration: but as it came before the Court collaterally, and ſeveral objections were taken upon the *Annuity Act*, the infancy of the wife and the nature of her intereſt at the time, the Maſter of the Rolls, though upon the general queſtion inclining in favour of the wife's equity againſt an aſſignee for valuable conſideration, would not determine it; but referred it to the Maſter to approve a ſettlement upon the wife and her iſſue with liberty to the repreſentative of the obligee to apply.

houſe of trade then carried on under the firm of *Joſeph* and *David Franco;* for which reaſon he ordered them to cloſe the buſineſs then begun, and to ſtrike a balance in the books of the ſaid company within one year after his death; and, if poſſible in the courſe of that year, or as ſoon as may be, to remit to his nephews *Moſes* and *Raphael Franco* at *London* as far as the ſum of 27,000*l.* ſterling, for them to inveſt in Bank Long Annuities conſolidated or ſome other of the public funds, as they ſhould think proper, to be inveſted in the names of his ſaid nephews; to whom he gave the ſtock ſo to be purchaſed, in truſt for them to receive the intereſt or dividends every half-year, and pay them to his beloved daughter *Raquel*, wife to his nephew Mr. *Abram Haim Franco*, during the term of her natural life; and to pay or cauſe to be paid the ſaid dividends into the hands of his ſaid daughter, and take her receipt for the ſame; which was to be a full diſcharge to his ſaid nephews; and after his daughter's deceaſe he ordered his ſaid nephews, or their executors or adminiſtrators, to pay the ſaid capital with what increaſe there might be to the ſons or daughters, which it ſhould pleaſe God to grant to his daughter *Raquel*, in equal ſhares; as well to the males as to the females; unto each of them, as they ſhall attain to their ages of twenty-one years; and ſooner if any of them ſhall be married with the conſent of their parents, before they attain ſuch ages: but in caſe his ſaid daughter *Raquel* ſhould die without leaving iſſue of her body, he ordered the capital to be divided among his nephews, ſhare and ſhare alike; and if any of them ſhould die before his daughter, the ſhare of ſuch of them to be divided in equal portions among ſuch as ſhould be living at her deceaſe.

By a codicil, dated the 5th of *February* 1775, confirming the ſaid legacy in the will, and taking notice of the death of *Moſes Franco*, the teſtator ordered the ſum of 27,000*l.* to be remitted to *Raphael Franco*, *Jacob Franco*, and *Francis Franco*.

The teſtator died on the 12th of *March* 1783. A great part of the legacy of 27,000*l.* was remitted to *England*, and laid out in Bank Annuities.

Leah Franco, the only child of the teſtator's daughter *Raquel* by her huſband *Abram Haim Franco*, at the age of fifteen married

Michael O'Brien; who died on the 10th of *September* 1795; leaving his wife, ſtill under the age of twenty-one, and one ſon, *Joſeph O'Brien*, the only iſſue of that marriage.

Michael O'Brien by his will, dated the 11th of *Auguſt* 1775, reciting his marriage, and the legacy of 27,000*l.* given by the will of *Joſeph Franco*, and that the above ſum was left to the ſaid *Raquel Franco* without any control or interference of her ſaid huſband, and to her lawful iſſue after her deceaſe, and that ſhe has only one child (nor ever had) living, but the ſaid *Leah O'Brien*, his wife, and the ſum of 33,079*l.* Bank Annuities (purchaſed with part of the money remitted) devolves to his wife after the deceaſe of her ſaid mother; and farther reciting, that he had one ſon by his ſaid wife, about the age of two years, or upwards, to whom the ſaid ſum of 33,079*l.* Bank Annuities will alſo deſcend: to which he will be entitled upon the demiſe of his mother, according to the will of his grandfather, in the event of the death of his grandmother and mother without any other children but him, nominated his worthy friend *Bartholomew Marſano* ſole and only guardian to his ſon during his minority; and the teſtator in the event of the death of his mother-in-law appointed his wife joint guardian with *Marſano* during his ſon's minority and her widowhood: after which period her guardianſhip to ceaſe, and return ſolely to *Marſano;* and in the event of her marrying again, and having one or more children by her ſecond marriage, then, as the ſaid capital ſum of 33,079*l.* becomes diſtributable among all his wife's lawful children, ſhare and ſhare alike, he ſtill continued, and willed thereby to appoint, the ſaid *Bartholomew Marſano* as his ſaid ſon's guardian to receive, recover, apply, and diſpoſe of, his ſhare of ſuch capital ſtock as may come to him after his mother's deceaſe in common with her other children. The teſtator alſo gave to *Marſano*, all debts due to him, which he ſhould hereafter particularize, and all other eſtate, legacies, and bequeſts, which may ſtand good in law, whatſoever, hereafter made to him, unto *Marſano*, his executors, adminiſtrators, and aſſigns, in truſt for his ſaid ſon; and he appointed his wife executrix.

Soon after the death of *O'Brien* his wife being ſtill under age proved his will.

1799.
FRANCO
v.
FRANCO.

Jacob Franco, one of the truſtees named in the codicil to the will of *Joſeph Franco*, married *Leah O'Brien*, while ſhe was ſtill under age, but with the conſent of her parents.

The bill was filed by *Jacob Franco*; after the death of *Raquel Franco*, and after his wife had attained the age of twenty-one; praying, that the defendants, the other truſtees of the ſum of 33,079*l.* Bank Annuities may be decreed to join in a transfer into the ſole name of the plaintiff *Jacob Franco* in right of his wife.

The bill charged, that the firſt marriage of *Leah Franco* was had without the conſent of her parents, before ſhe had attained the age of twenty-one; and that her firſt huſband made no ſettlement, nor did any act to reduce the legacy into poſſeſſion; nor could he have done ſo, by reaſon that *Raquel Franco*, who was entitled for life, ſurvived him.

The anſwer of the infant defendant *Joſeph O'Brien*, and of *James Lowe*, who had married *Elizabeth*, the daughter and adminiſtratrix of *Bartholemew Marſano*, ſtated, that, differences having ariſen between *Abram Haim Franco* and his wife *Raquel*, they ſeparated, and lived apart till the deceaſe of *Raquel*; and by the deed of ſeparation, dated the 16th of *March* 1791, reciting, that *Raquel Franco* was poſſeſſed of or entitled to the ſum of 32,200*l*, 3 *per cent.* Conſolidated Bank Annuities, purchaſed with part of the legacy under the will of her father, for her life, and reciting the agreement between her and her huſband to live ſeparate, and that they had only one child, of the age of fourteen years, or thereabouts; who, it had been agreed, ſhould reſide with, and be maintained and ſupported by her mother; but that her father ſhould have the ſole care and management of her education, and for that purpoſe ſhould appoint a governeſs for her, but who was to live with and be maintained by his ſaid wife, and ſuch maſters, as to him or ſuch perſons as he ſhould appoint in his abſence ſhould ſeem proper; and that *Raquel Franco* ſhould appoint the truſtees to pay out of the ſaid truſt funds ſuch reaſonable ſum as *Abram Haim Franco* ſhould agree to give ſuch governeſs, maſters, &c, for educating her daughter, not exceeding 63*l.*, and alſo that he and thoſe he ſhould appoint ſhould have the ſole direction, management, and liberty to diſmiſs ſuch governeſs, maſters, and inſtructors, and to replace them, and that ſuch governeſs ſhould attend the daughter at all times, when ſhe was not viſiting with her mother, and that her mother ſhould never prevent her viſiting her father, whenever he ſhould be deſirous of ſeeing her, and that no perſons whatever ſhould live, reſide, or lodge, under the ſame roof with the ſaid *Raquel* or her daughter, objected to by *Abram Haim Franco* in manner therein mentioned, it was witneſſed, *&c*; and the parties covenanted accordingly.

The anſwers alſo ſtated, that the defendants believed, *Leah Franco* did not marry *Michael O'Brien* without the knowledge or conſent of her mother: on the contrary ſuch marriage was chiefly promoted and brought about by *Raquel Franco*, and was had with her expreſs conſent and approbation; and though the father of *Leah Franco* knew or had reaſon to believe, that *O'Brien* was greatly eſteemed by the ſaid *Raquel* and *Leah*, and that a marriage between him and *Leah* was likely to take place, yet that the previous knowledge of the time, when it was to take place, or the previous conſent of her father was not had, owing to the differences between him and his wife; and the defendant believes, under the circumſtances, under which ſuch marriage took place, the previous conſent of the father would have been given, if aſked; and that he was after the marriage upon terms of intimacy with his ſaid ſon-in-law; and therefore they believe, he was ſatisfied with the marriage.

The defendants farther ſtated, that they believed, that, after the marriage *Raquel Franco*, *Michael O'Brien*, and his wife reſided together; and having contracted debts in the courſe of their living, and in conſequence of the difficulties, in which *Abram Haim Franco* had involved his wife, they had occaſion to raiſe a a ſum of money for their neceſſary ſupport; and, *O'Brien* and his wife having no fortune or income whatſoever except their intereſt in the legacy of 27,000*l.* under the will of *Joſeph Franco*, by a bond, dated the 11th of *September* 1794, executed by *Raquel Franco*, *Michael O'Brien*, and *Leah*, his wife, they became bound to *Bartholemew Marſano*, his heirs or aſſigns, in the penal ſum of 1680*l.*; and by the ſaid bond, reciting, that *Raquel Franco* was entitled to the dividends, intereſt, and annual proceeds, of the ſum of 33,000 *l.* 3 *per cent.* Conſolidated Bank Annuities under the will of her father, and her iſſue, and that *Leah O'Brien* was the only daughter and heireſs of *Raquel Franco*, to whom the ſaid ſum deſcended after her death, that *Michael O'Brien* was her huſband, by whom he had one child; and that they had for their mutual benefit and accommodation occaſion to raiſe by way of annuity the ſum of 840*l.*, which ſum *Bartholemew Marſano* thereby agreed to advance for their mutual benefit and accommodation, it was witneſſed, that in conſideration, of his advancing to *Raquel Franco*, *Michael O'Brien*, and *Leah*, his wife, the ſaid ſum for the purpoſe aforeſaid, they and each of them did thereby jointly and ſeverally bind themſelves according to their reſpective contingent and exiſting intereſts therein to pay out of the dividends, intereſt, and proceeds, of the ſaid 33,000 *l.* 3 *per cent.* Conſolidated Bank Annuities, as aforeſaid, according to their then preſent and contingent intereſts, as aforeſaid, unto *Bartholemew Marſano*, his heirs and aſſigns, the yearly ſum of 70 *l.* during their joint lives or the life of the longeſt liver; and it was thereby conditioned, that if they or any of them ſhould well and truly pay, *&c*, then the obligation was to be void; or otherwiſe to remain in full force; with a memorandum of agreement for redemption by two inſtalments of 420 *l.* each.

The anſwers farther ſtated, that the defendants believed, a memorial of the ſaid annuity was duly inrolled; and that *Raquel Franco* and *Michael* and *Leah O'Brien* were frequently in want of money for their living, and to pay debts; and *Marſano* out of friendſhip lent them money; by which means they became indebted to him to the amount of 501 *l.* 15 *s.*; and a few days before the death of *O'Brien* he reminded his wife and mother-in-law of *Marſano*'s friendſhip; and *Marſano* having drawn a promiſory note, dated the 24th of *Auguſt* 1795, *Raquel Franco* and *Leah O'Brien* ſigned it.

The defendant ſubmitted, whether *Leah Franco* had not a veſted intereſt at the time of her marriage with *O'Brien* in the ſaid legacy, payable upon her attaining the age of twenty-one years, or marriage with the conſent of her parents, ſubject only to the life-intereſt of her mother; and, in caſe ſhe married without the actual knowledge and conſent of her father, whether he had not by the terms of the deed of ſeparation ſo far given up the management of his daughter *Leah* and her perſon as to make the conſent of *Raquel Franco* equivalent to the conſent of both, ſo as to make the ſaid legacy actually veſted in and payable to *O'Brien* in right of his wife; and whether he did not by his marriage become entitled to ſuch intereſt as to enable him to exerciſe any act of ownerſhip over it; and in particular, whether the annuity was not well charged; and the defendant *Lowe* in right of his wife claimed the benefit of the annuity; and alledged, that the plaintiff had by his ſubſequent conduct confirmed it.

In ſupport of that allegation the defendants produced letters from the plaintiff to *Marſano*, requeſting him to wait, till the plaintiff's wife ſhould be of age, and in general terms promiſing payment at that period.

There was alſo evidence, that the conſideration of the annuity was money, that had been advanced at different times for the neceſſary ſupport of *Raquel Franco*, *O'Brien*, and his wife.

A memorial had been regiſtered under the *Statute* (*a*) as of a grant of an annuity; to which ſeveral objections were taken in the argument.

Mr. Piggott and Mr. Stanley for the plaintiffs.—With reſpect to the claim ſet up on the part of the infant defendant under the will of his father *Michael O'Brien*, that will is totally inoperative as to this money, being in the funds in the names of truſtees; the mother of the plaintiff *Leah Franco* being entitled to the intereſt for her life, and being then alive, and not having died till after the marriage of the plaintiffs.

The firſt queſtion is, whether *Leah* took a veſted intereſt. Under the words of the will it was not veſted till the death of her mother. Nothing is given to the children till the death of their mother. It is not a gift, to be paid at a future time; but as it is all in one and the ſame clauſe, the gift cannot be ſeparated from the time of payment; as is ſometimes done (*b*). The gift over, if

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(*a*) 17 *Geo.* 3. *c.* 26.

(*b*) See *Booth* v. *Booth*, *ante* 399. *Batsford* v. *Kebbell*, *Wadley* v. *North*, and *Mackell* v. *Winter*, *ante*, vol. 3. 363, 364. 536.

Raquel Franco ſhould die without leaving iſſue, is clearly to be conſtrued, if ſhe does not leave children at her death. A child dying in her life could take no intereſt.

As to the claim under the grant of the annuity, in which they joined, *Leah Franco* had then nothing in poſſeſſion. She was not of age. Her mother was entitled to the intereſt for her life. It is impoſſible, after what has been decided, to ſupport the claim of *Marſano*, ſo as to affect the intereſt of *Leah Franco*. *Like* v. *Beresford* (*ante*, vol. 3. 506.), *Macaulay* v. *Philips* (*ante* 15.) and all the other caſes were before the Lord Chancellor in *Whiſtler* v. *Newman*, (*ante* 129); and though upon that occaſion his Lordſhip did not find it neceſſary to review the caſes, which were ſuppoſed to ſtand in oppoſition to *Like* v. *Beresford* and *Macaulay* v. *Philips*, they were all diſcuſſed; and the Lord Chancellor ſtated (*a*) in few words a very clear opinion with regard to the effect of them; that, if the rule laid down in them is to be puſhed to it's full extent, a married woman having truſtees and her property under the protection of this Court is infinitely worſe off, and much more unprotected, than ſhe would be, if left to her legal rights; and that when it may be neceſſary with regard to creditors to enter into the conſideration of theſe caſes, it will be to be conſidered, whether the Court ought to do more than this: where the creditor, of the huſband, or perſon dealing with the married woman, has got any legal hold of the fund, he muſt take it; if he has not any legal hold upon it, it is difficult to find any principle, upon which this Court can make his ſituation better, and improve a ſecurity, that the law will not acknowledge. His Lordſhip added, that upon ſome of the caſes at law he had felt a degree of doubt, that he had not been able to remove: but it was going a great way farther, than any reaſon of juſtice, much more of equity, would warrant, to extend it beyond any legal right, that may have been got, by the aid of a Court of Equity.

In this caſe the married woman was not dealt with at all. She was in poſſeſſion of nothing. She was an infant at the time. She laboured under both incapacities. As little could the huſband by any aſſignment for valuable conſideration by his ſingle act affect her right. If he could do this, by parity of reaſoning he

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(*a*) *Ante* 144, 145.

could ſtrip her of the whole, and prevent her having any proviſion whatſoever, and give away by anticipation, before ſhe came into poſſeſſion, the whole of this intereſt. The fund ſo remaining down to the death of the mother, being in the names of truſtees, the daughter's intereſt was a *choſe in action*, not capable of being reduced into poſſeſſion, as ſhe was an infant. *Macaulay* v. *Philips* was a much ſtronger caſe, from the proceedings, that had taken place: a decree having been made, and a reference to the Maſter directed: yet it ſurvived to the wife. *Like* v. *Beresford* is not exactly this caſe: but the principle upon all the caſes is this; that no aſſignee of the wife's intereſt can be in a better ſituation than the huſband; and there is no difference in this reſpect between a voluntary aſſignment and one for valuable conſideration. That principle is eſtabliſhed by *Macaulay* v. *Philips* and *Whiſtler* v. *Newman*.

This intereſt therefore clearly ſurvived to the wife upon the death of her huſband; and became veſted in her upon the death of her mother. *O'Brien* marrying her without conſent, and having died before his wife attained the age of twenty-one, and in the life of her mother, took no intereſt; and had no right to make any diſpoſition as to any part of the fund, or any incumbrance upon it; and his aſſignee can be in no better ſituation. The plaintiff is therefore entitled, ſubject to ſuch proviſion as the Court ſhall think proper.

As to the memorial, the objections are, that the conſideration is ſtated to have been paid in notes of the Bank of *England* and in lawful money of *Great Britain*. Though bank-notes are conſidered as caſh, yet if they chooſe to diſtinguiſh them, the memorial ought to have gone farther. Another objection is, that the conſideration is ſtated to have been paid to *Raquel Franco*, *Michael O'Brien*, and his wife, without diſtinguiſhing, how much was paid to each.

Mr. Campbell for the defendants Lowe, and his wife, adminiſtratrix of Marſano.—This was clearly a veſted intereſt. It is an immediate bequeſt upon the death of the teſtator, not merely for the benefit of the mother, who was entitled for her life, but to the children; who take a veſted intereſt through the medium of truſtees, to be paid at the age of twenty-one or marriage. There is no bequeſt over upon marriage without conſent. Any marriage would therefore have rendered it payable, if the mother was dead. But it appears, the marriage with *O'Brien* took place with the conſent of the mother.

With reſpect to the annuity chargeable upon the dividends of this fund, to which they were all parties, nothing could be more fair or meritorious. It was ſubject to redemption by two inſtalments. The queſtion then is, whether the huſband cannot for valuable conſideration aſſign a ſmall ſpecific part of a large ſpecific ſum belonging to, and, I ſay, veſted in the wife, though in the hands of truſtees; and whether the equity of the wife will override the claim of that perſon, *bonâ fide* advancing his money. This queſtion ariſes ſubſtantially between the ſecond huſband and the creditor of the firſt. By the marriage the huſband obtained a right to reduce into poſſeſſion every legal right his wife had. He might have aſſigned any legal right voluntarily: it is quite clear he could for valuable conſideration: and entirely, without reſerving a ſingle ſhilling. He becomes ſubject to her debts and bound to maintain her. He might have incurred debts for that purpoſe. It is in evidence, that this money and other ſums were advanced for the neceſſary ſupport of Mr. and Mrs. *O'Brien*. The only pretence for reſiſting the claim is, that this is an equitable intereſt veſted in truſtees.

In *Jewſon* v. *Moulſon*, 2 *Atk.* 417, the proviſion was clearly not veſted, till the wife attained the age of twenty-one: but Lord *Hardwicke* held, that the wife's equity did not enable her to ſtrip the creditor of all benefit; though a reaſonable proviſion was to be made for her. Great ſtreſs was there laid upon the aſſignment being of her whole fortune. That caſe is alſo ſtated in a manuſcript note by Mr. *Foreſter*; which correſponds with the printed Report.

The aſſignment to *Marſano* is of a very ſmall proportion of this property. There is not a caſe to be found, except *Like* v. *Bereſford*, in which the whole fund, upon part of which a ſecurity was given to a creditor for valuable conſideration, has ever been as againſt that creditor ſecured to the wife. That would be contrary to all principle; and the conſequences would be moſt dangerous. I admit, an aſſignee is in no better ſituation than the huſband. Suppoſe, the firſt huſband was now coming to the Court, as the ſecond huſband is, praying, that the whole fund may be paid to him: and ſhewing, that he had incurred debts for the maintenance of his wife: would the Court have diſpoſed of the whole fund, and ſecured it for the benefit of the wife without allowing the huſband the ſums he had ſo expended? As he became liable to her debts, it would be groſs injuſtice in that ſort of caſe to ſettle the whole property upon her. This creditor ſtands rather in a preferable ſituation. *A fortiori* he has a right. The Court will at leaſt inqure into the application of the money advanced by *Marſano*; who appears from the will of *O'Brien* to have been their intimate friend.

Suppoſing this legacy contingent, in *Jacobſon* v. *Williams*, 1 *P. Wms*. 382, with all the objections attending it (*a*), it was not contended, that the whole fund was to be given to the wife. An aſſignment for valuable conſideration is much ſtronger than the aſſignment by operation of law upon a bankruptcy. That appears to have been Lord *Thurlow*'s opinion in *Worrall* v. *Marlar*, and *Buſhnan* v. *Pell*, ſtated in Mr. *Cox*'s note to *Boſville* v. *Brander*, 1 *P. Wms*. 458. In *Like* v. *Beresford*, the only caſe contradicting that, it is to be obſerved, the huſband had ran away with a ward of the Court; and it was a ſmall fund. Your Honor alſo thought yourſelf bound by what Lord *Thurlow* had done.

Though in *Macaulay* v. *Philips* and *Whiſtler* v. *Newman*, thoſe *Dicta* were thrown out, thoſe caſes have no relation to this point; as in each of them the fortune of the wife was ſettled to her ſeparate uſe. In this caſe there is nothing of that ſort: but the huſband on his marriage had a right to diſpoſe of this property for valuable conſideration.

Bates v. *Dandy*, 2 *Atk*. 207, which was before Lord *Hardwicke* little more than a year before *Jewſon* v. *Moulſon*, is ſtrong in favor of the aſſignee for valuable conſideration: Lord *Hardwicke* obſerving, that the huſband might have diſpoſed of the whole property in the manner he did to ſecure the plaintiff's debt. In every caſe the aſſignee for valuable conſideration has received either the whole property, or ſome part. If the Court gives any part

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(*a*) See the note, 1 *P. Wms*. 385. and 2 *Atk*. 420.

part of this fund to the preſent huſband, upon what ground can this ſmall part of it be refuſed to the creditor of the firſt huſband?

With reſpect to the objection to the memorial, in *Kelſe* v. *Ambroſe*, 7 *T. Rep. B. R.* 551. it was held, that ſums of money paid from time to time are a good conſideration for the grant of an annuity, even ſtated to be for ſo much money paid.

Mr. Hall for the defendants Lowe and his wife.—The deciſions in equity are uniformly in favor of the aſſignee for valuable conſideration. Thoſe againſt him have been under particular circumſtances. He ſtands upon the marital right of the huſband, who has complete dominion over all the property of his wife; at law, unqueſtionably: upon the principle, that the wife has loſt her diſtinct character; which is abſorbed in that of her huſband. Her property therefore neceſſarily remains with him. Great burthens are impoſed upon the huſband. All her debts at that time or in future are thrown upon him. The conſideration he receives for that obligation is, that he ſhall have her property throughout. That property is to be applied for the maintenance of both: but the application is to be exerciſed by one. The right of diſpoſition follows as an incident.

With regard to marital rights the rules of law and equity are the ſame. A difference may be objected as to truſts of money and of lands. There is no ſuch difference. Why ſhould there be any difference in a Court of Equity? The words of Sir *Joſeph Jekyl*, 2 *P. Wms.* 753, are very material as to the latitude of diſcretion in equity. It is ſaid, the truſt of a term is an anomalous caſe. It is by no means ſo. It would be an anomalous caſe, if the remedy was withheld upon a truſt of money, and not upon the other truſt. Where you muſt reſort to this Court for the remedy, it is not material what is the ſubject.

With reſpect to the authorities as to the truſt of a term, in Sir *Edward Turner*'s caſe, 1 *Vern.* 7. and much more fully 1 *Chan. Caſ.* 307., the firſt deciſion was againſt the claimant under the huſband: but the decree was reverſed upon appeal to the Houſe of Lords. According to that caſe the huſband might have deprived himſelf of his marital right. In *Pitt* v. *Hunt*, 1 *Vern.* 18. 2 *Freem.* 78. it was thought, that this ſort of property was not to be affected except in a Court of Equity; and Sir *Edward Turner*'s caſe was treated as the firſt caſe eſtabliſhing the right of the huſband to diſpoſe of it: but there is a prior caſe acknowledging the doctrine; *Bullock* v. *Knight*, 1 *Ch. Caſ.* 265; which I cite principally as to the Lord Keeper's language. This caſe was two years prior to the *Statute of Frauds*. *Tudor* v. *Samyne*, 2 *Vern.* 270. is alſo a deciſion in favor of the aſſignee of the truſt of a term (*a*).

It is clear upon *Jacobſon* v. *Williams*, 1 *P. Wms.* 382. *The Duke of Chandos* v. *Talbot*, 2 *P. Wms.* 601. and many other caſes, that an agreement by the huſband for valuable conſideration would operate upon the wife's intereſt, either veſted or contingent. *Walters* v. *Saunders*, 1 *Eq. Ca. Ab.* 58. was a caſe of money. If this can be done upon money or a *choſe in action*, why not upon a truſt of money, or of a *choſe in action?* The principle is preciſely the ſame; that the whole right is in the huſband for the common ſupport of both. *Povey* v. *Brown* (*b*), *Gilb. Eq. Rep.* 80. and *Pre. Ch.* 325 is a clear authority, in which, not a part only, but the whole fund, was taken from the wife. *Atkins* v. *Dawbury*, *Gilb. Eq. Rep.* 88. is even in favor of a volunteer; upon the ground, that the huſband had power to extinguiſh or releaſe the legacy. *Bates* v. *Dandy* was undoubtedly the caſe of a truſt of money; and an agreement by the huſband for valuable conſideration to aſſign, with a depoſit of the deeds, was held a complete diſpoſition of the fund to the extent, to which it went. It has been uniformly acknowledged, that a part is the ſubject of diſpoſition. In *Saddington* v *Kinſman*, 1 *Bro. C. C.* 44, though it is not a deciſion, there is a ſtrong opinion of Lord *Thurlow* to the ſame effect as in *Worall* v. *Marlar*, and *Buſhnan* v. *Pell*, in favor of the aſſignee for valuable conſideration; and that is the uniform tendency of the caſes.

It is impoſſible, that the huſband being incumbered with all the burthens reſulting from the marriage can perform them, if he is deprived of the means. Conſider, what has been the courſe

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(*a*) 3 *Chan. Rep.* 223, 224. *Bates* v. *Dandy*, 2 *Atk.* 208. are alſo in favor of the aſſignee. *Contra*, *Hardr.* 496. The point was treated as doubtful by the Maſter of the Rolls, *ante* 19. in *Macaulay* v. *Philips*.

(*b*) As to that caſe ſee the obſervation of the Maſter of the Rolls, *Ante*, vol. 3 512.

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of this Court. It has never been held, that the huſband is bound to ſettle the whole property of his wife. A certain part has always been given to him. To a certain extent therefore he has a right to diſpoſe. So the general aſſignee under a commiſſion of bankruptcy, who is not the favored aſſignee noticed by Lord *Thurlow*, has always had a conſiderable portion. Is it now to be determined, that a very limited, partial, aſſignment is not to have the ſame conſtruction as that general aſſignment; and in a caſe between the ſecond huſband and a purchaſer for valuable conſideration under the firſt? Shall the ſecond huſband take the whole property to the excluſion of that purchaſer; without whoſe aſſiſtance the wife and her firſt huſband might have ſtarved? The plaintiff ſets up this claim under the marital right, the operation of which he denies in the firſt inſtance. *Like* v. *Beresford* does not bear upon this queſtion. The parties in that caſe were in ſuch a ſituation, that it was impoſſible to do any thing elſe; and your Honor conſidered yourſelf fettered by what Lord *Thurlow* had done upon the petition. The huſband had forfeited the whole property by marrying a ward of the Court. The property was in ſuit; and he had notice of it. The thing was either agreed to be done, or by the rules of the Court as well as in conſcience and honor he was bound to do it. He had been guilty of a contempt; which required the ſettlement as a retribution.

Mr. Richards for the defendant, the infant child by the firſt marriage.—Without doubt this was a veſted intereſt; and the huſband was entitled, ſubject to whatever equity the Court might impoſe upon him. Then he made his will; and diſpoſed of it in a way, giving a conſiderable part to this infant child, and appointing his wife executrix. If the huſband affects to diſpoſe of his wife's *choſe in equity*, and makes his wife executrix, and ſhe proves the will, and thereby accepts the inſtrument and acts under it, ſhe is concluded from ſaying, that will does not diſpoſe of the property it affects to diſpoſe of.

Mr. Piggott in reply.—There is no doubt, that this is now a veſted intereſt in *Leah Franco*: but at the time of the tranſaction with *Marſano*, as ſhe cannot be taken to have married with conſent, her intereſt was clearly contingent; and her huſband had no preſent intereſt, that he could bind. The claim of *Marſano* ſtands only upon old caſes, and expreſſions contained in them, before the rule was ſettled. The ſubject has been redeemed from confuſion by the recent caſes. If the want of ſubſiſtence was a reaſon for ſupporting the grant of the huſband, *Like* v. *Beresford* was a caſe for that. There alſo the huſband was in exiſtence. His right was not gone, before the intereſt became veſted. In this caſe the connection with the firſt huſband ceaſed, before the legacy became veſted; and other rights and intereſts have ariſen. So in the caſe of bankruptcy the bankrupt is living; and the Court gives effect to the claim of an exiſting huſband, or of his aſſignees, having all his rights. *Jacobſon* v. *Williams* and *Boſville* v. *Brander* were caſes of that kind (*a*); and the valuable notes of Mr. *Cox* refer to all the other caſes, except the few, which have ſince occurred; in which the ſubject has been moſt amply conſidered. In thoſe caſes the Court could not turn the huſband away. No more can they turn away this plaintiff.

This, which is called an annuity, is in truth a bond by *Raquel Franco*, *Michael O'Brien*, and *Leah*, his wife, as to whom it is void: as to the other two, if effectual, it muſt be purſued againſt their repreſentatives. It is clear upon the *Annuity Act* (*b*), that the whole conſideration and the nature of it muſt be ſtated in the deed and memorial. It has been repeatedly held, that if it is not money, and the whole of it money, and paid at the time, to ſtate it to be a purchaſe for money is bad. If the conſideration, or any part of it, is a precedent debt, the law is not ſatisfied by ſtating it to be money paid at the time of the contract. *Kirkman* v. *Price*, 1 *H. Black.* 309. *Jaques* v. *Witby*, and *Shove* v. *Webb*, 1 *Term Rep. B. R.* 557. 732, all eſtabliſh that principle. The conſideration is in the bond ſtated to be the ſum of 840*l.*, which *Marſano* "hereby agrees to advance;" which is quite contrary to their evidence. Neither is it diſtinguiſhed, how much was advanced to each.

Againſt theſe obſtacles this Court will not give them its aid to this 70*l.* a year. If the annuity is bad under the *Act*, no ſubſequent unequivocal promiſe would ſet it up: much leſs theſe letters from the plaintiff; which are much too vague and looſe to have ſuch an effect; and not founded in any conſideration paid

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(*a*) See the note at the end of this caſe.

(*b*) 17 *Geo.* 3. *c.* 26.

either to the plaintiff or his wife, upon which a court of Equity can act. They cannot therefore ſet up this contract, demoliſhed as to any lien upon theſe funds.

In the courſe of the argument the Court ſeemed inclined to think this was a veſted intereſt in *Leah O'Brien*; and the plaintiffs ſubmitted to make ſuch proviſion as the Court ſhould think proper for the infant child by the firſt marriage.

The Court expreſſed ſome doubt, whether the bond could be conſidered as an aſſignment: to which it was anſwered, that all equitable aſſignments operate by way of contract; that the condition of the bond amounts to an aſſignment; and a bill might have been filed for a ſpecific performance.

Upon the queſtion as to the equity of a married woman againſt an aſſignment of her equitable intereſt by her huſband for valuable conſideration, whether the aſſignee has a more favorable caſe, where the ſubject is a truſt of a term for years, *Quære*.

With reſpect to the difference as to a term for years of land in truſt for a married woman, the Maſter of the Rolls obſerved, that there was a diſtinction; as it might be taken in execution upon a *fieri facias*: but notwithſtanding he had thrown out that doubt (*a*), it might not be well founded; as he had not conſidered the point ſufficiently to form an opinion upon it.

April 15th.

Maſter of the Rolls.—I have looked into this caſe; and am extremely ſorry to find, that the great point cannot properly be determined in this ſtage of the cauſe.

The bill is not brought with any intention of bringing before the Court any intereſt whatſoever except that of the minor ſon: but *Marſano* having been appointed his guardian, the anſwer of Mrs. *Lowe*, the daughter and adminiſtratrix of *Marſano*, ſtates not only the right the infant ſon may claim under the will, or as a child by the firſt marriage, but alſo ſets up a demand in reſpect of an annuity granted to *Marſano* in conſideration of 840*l*. by way of bond.

It is impoſſible for me in this ſtate of the cauſe to take any notice of this annuity. It is no part of the bill; and if it had not

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(*a*) *Ante* 19. in *Macaulay* v. *Philips*.

been for the accident of the perſonal repreſentative of *Marſano* being concerned for the child, no ſuch claim would have appeared; and it ſtands merely upon their anſwer. I do not know, in what way I can take notice of this, except by directing an inquiry, with a view to aſcertain all the facts, that ariſe reſpecting it; for even the queſtion will not ariſe, till it appears, that *Marſano* was a purchaſer for valuable conſideration; and there are many objections made to the annuity. Suppoſing *Michael O'Brien*, the firſt huſband, was competent to fix the fund, it would come on much more properly upon a bill than in this collateral way. I ought not to prevent the repreſentative of *Marſano* from bringing before the Court this claim, if the Maſter's report is againſt him, either by petition or in ſome other way.

I have looked into the caſes; and have been furniſhed by Mr. *Powell* with a note in a manuſcript book of Mr. *Fearne*'s of a caſe, which has a very conſiderable bearing upon this point; *The Earl of Saliſbury* v. *Newton*, in *Chancery*, 2d *July* 1759. Unfortunately there is no entry in the Regiſter's Book. Mr. *Fearne*'s note ſtates the caſe to be this. A married woman being entitled to a ſum of money in the hands of truſtees or executors, her huſband, having made no proviſion for his wife or children, and being indebted to the Earl of *Saliſbury*, aſſigns as a ſecurity for that debt the ſum of money, to which his wife was entitled; and dies, making no proviſion for his wife and children. The truſtees refuſing to aſſign, the Earl of *Saliſbury* filed the bill: but the Lord Keeper refuſed to give him any relief; as no proviſion was made for the wife and children; and he could be in no better ſituation than the huſband; and the Court would have put terms upon him.

A reference has been had to the Regiſter's Minute Book; where the caſe appears thus. The bill was filed to have a fifth part of the perſonal eſtate and money produced by the ſale of real eſtate, to which the huſband was entitled in right of his wife, applied in ſatisfaction of the debt due to the plaintiff. According to the minutes taken by the Regiſter it was referred to the Maſter to inquire, what fortune the widow *Catherine Durham* was entitled to either by the will of her father, or by the articles antecedent to, upon, or after, her father's marriage; and it was directed, that ſhe ſhould make her election, whether ſhe would take under the will or the articles. An inquiry was directed, whether the huſband

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made any ſettlement or proviſion for the wife or her children; and, if he had not, the Maſter was directed to conſider, what would be a proper proviſion out of her fortune for her and her children, and to ſtate the ſame to the Court, *&c.*

This, like the other caſe of *Wenman* v. *Maſon* (*a*), is a very conſiderable authority, that an aſſignee even for valuable conſideration cannot prevent that Equity, which the Court is in the habit of adminiſtering. I am afraid, it will be found, that the caſe of *The Earl of Saliſbury* v. *Newton* went no farther. I wiſh it to be looked into, before this cauſe comes on again.

Marriage in *Scotland* valid.

I do not wiſh at preſent to go farther, though I have a very decided opinion upon it, than to refer it to the Maſter to approve of a proper ſettlement upon the plaintiff *Leah Franco* and her children; and, whether the defendants *Lowe* and his wife are deſirous, that I ſhould give them liberty to make a propoſal before the Maſter, or let them file a bill, is for their conſideration. I am not inclined to take notice of *Marſano*'s claim: but I muſt not ſhut it out. He may be ſaid to come in juſt in the ſame way as the petitioners in *Like* v. *Bereſford* came in before Lord *Thurlow*. That caſe is a ſtronger authority than Mr. *Hall* ſuppoſes. There was a bill filed, it is true: but was the huſband committed (*b*)? If the fact is, that the marriage in *Scotland*, which has been determined by the Court of Delegates to be a good marriage, was before the bill filed, could the ſecond marriage put him more in contempt than he was before? It is ſtrong to ſay that.

By the decree it was referred to the Maſter to approve of a proper ſettlement to be made upon the plaintiff *Leah Franco* and her iſſue (*c*); with liberty to the defendants *Lowe* and his wife to apply by petition or otherwiſe, as they may be adviſed (*d*).

(*a*) In *Chancery* 1765 before Lord *Northington*; ſtated in Mr. *Cox*'s note to *Boſvile* v. *Brander*, 1 *P. Wms.* 459. *Ed.* 5.

(*b*) It was ſaid at the Bar, that he was committed upon the marriage in *England*.

(*c*) The Maſter of the Rolls in pronouncing the decree obſerved, that he did not confine it to her iſſue by her preſent huſband.

(*d*) All the other authorities upon this point are referred to in the caſes cited upon this occaſion; particularly in the notes of Mr. *Cox* and Mr. *Sanders* to the new editions of *Peere Williams* and *Atkyns*.

In *Hill* v. *Atkinſon*, at the Rolls the 26th of *June* 1797, this point came on upon a petition; and Mr. *Hall* for the aſſignee of the huſband cited moſt of theſe caſes, and in addition to them *Paſchall* v. *Lord Carteret*, 4 *Vin.* 57. The Maſter of the Rolls with reference to Lord *Thurlow*'s opinion in *Worrall* v. *Marlar* and *Buſhnan* v. *Pell*, in Mr. *Cox*'s note, expreſſed himſelf thus:

"I have the ſame opinion I ever had; and the note ſhews, Lord *Thurlow* could only "ſay, that he did not find it any where decided, that if the huſband makes an actual "aſſignment by contract for a valuable conſideration, the aſſignee ſhould be bound to make "any proviſion for the wife out of the property aſſigned. He does not ſay, the aſſignee "has ever obtained the property without doing ſo. All, this Court does, would be per-"fectly nugatory, if the huſband could go and ſell his wife's property. Therefore I do "not agree with that opinion."

The Maſter of the Rolls added, that he would put the aſſignee to file a bill: but it was afterwards compromiſed.

The Equity of the wife as againſt the general aſſignees under a commiſſion of bankruptcy againſt her huſband or a general aſſignment for the benefit of his creditors, whether plaintiffs or defendants, is now perfectly eſtabliſhed by ſeveral late caſes: *Pryor* v. *Hill*, 4 *Bro. P. C.* 139; *Burdon* v. *Dean*; *Oſwell* v. *Probert*; *Brown* v. *Clark*; *Freeman* v. *Parſley*, *ante*, vol. 2. 607. 680; vol. 3. 166. 421.

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April 15, 16.

Where a teſtator conceiving himſelf entitled to the property of another perſon makes a general diſpoſition of all his eſtate, and gives ſome benefit to that perſon, he muſt elect. Therefore a huſband conceiving himſelf entitled under a void deed to a reſidue bequeathed to his wife, and dying without getting poſſeſſion, having made ſuch a general diſpoſition by a will, under which ſhe took an intereſt, it is a caſe of election; and her election to take the proviſion under the will, which, though leſs in point of value, was to her ſeparate uſe, was eſtabliſhed againſt the aſſignees under the bankruptcy of her ſecond huſband.

In this cauſe, the queſtion of election in the cauſe of *Wright* v. *Rutter* at the Rolls, (reported *ante*, vol. 2. 673 (*a*).) was brought before the Lord Chancellor, in the nature of an appeal from that decree, and upon a bond; which was not adverted to upon that occaſion.

Olive, the wife of *Edward Knight*, and *Anne*, the wife of *Donald Maclean*, were at the time of their reſpective marriages entitled under the wills of *Richard Glover* and *Elizabeth Moulton* to the reſidue of the real and perſonal eſtate of *Richard Glover*, after payment of his debts, legacies and funeral expences, in equal moieties. *Olive Knight* was at the time of her marriage in 1777 in poſſeſſion of a moiety of the real eſtate. In 1782 ſhe joined in a fine and recovery of that moiety to the uſe of *Edward Knight* and his heirs, in conſideration of a bond, dated the 2d of *May* 1782, by which he became bound to *John Rutter* and *Robert Bly* in the penalty of 1000*l*. The bond recited the deed to

(*a*) From miſ-information as to the event of that cauſe it is ſtated in the Report (*Ante*, vol. 2. 677.) that, the plaintiffs electing to take againſt the will of *Edward Knight*, the decree was, that the deed ſhould be delivered up to be cancelled. The fact is, that, the election being to take under the will, the bill was diſmiſſed.

make the tenant to the *præcipe*, and that *Edward Knight* in conſideration of his wife's joining him in the recovery had agreed with *Rutter* and *Bly*, that he would by will or deed deviſe, grant, and aſſure, the ſaid premiſes, in caſe he ſhould not ſell or diſpoſe thereof in his life-time, or in caſe he ſhould ſell any part thereof, then ſo much as ſhould remain unſold, ſo that *Olive Knight*, in caſe ſhe ſhould ſurvive him, ſhould receive the rents and profits thereof during her life, and after her deceaſe that her children by him and their iſſue ſhould have the ſaid premiſes and the fee-ſimple and inheritance thereof for ſuch eſtate and eſtates, and in ſuch proportion, manner, and form, as he, *Edward Knight*, ſhould by deed or will appoint, and for default of appointment, that the premiſes ſhould go to all, and their heirs, as tenants in common, and, for default of ſuch iſſue, to the children of *Olive* by any other huſband, as ſhe, whether *covert* or ſole and notwithſtanding coverture, ſhould appoint, and, for want of appointment, to all ſuch children, and their heirs, as tenants in common, or, if but one, to that one; and for default of ſuch iſſue, to *Edward Knight* and his heirs; and that, in caſe *Edward Knight* ſhould ſell or diſpoſe of the premiſes or any part thereof in his life, in ſuch caſe he ſhould by deed or will ſettle and aſſure a full and adequate ſum of money in lieu thereof, according to the money he ſhould receive upon ſuch ſale, to be within ſix months after his deceaſe, in caſe *Olive Knight* ſhould ſurvive him, put out in the funds, or upon good ſecurity, ſuch as ſhe ſhould approve, upon truſt to permit her to receive the dividends or intereſt thereof during her life, and from and after her deceaſe in truſt to pay the principal and the dividends accrued after her deceaſe to the child and children of *Olive* by *Edward Knight* and the iſſue of ſuch child or children, in ſuch manner as *Edward Knight* ſhould appoint, as aforeſaid; in default thereof, to ſuch children, as aforeſaid, in manner therein mentioned; and, in caſe ſuch children and their iſſue ſhould all happen to die in the life of *Olive Knight*, and ſhe ſhould happen to have any child or children by any after-taken huſband, then that the ſaid principal and intereſt ſhould after her deceaſe go and be to the only proper uſe and behoof of ſuch child or children by ſuch after-taken huſband or huſbands and the iſſue of ſuch child or children equally, ſhare and ſhare alike, at the age of twenty-one years or marriage; and in default of ſuch child or children, or the ſurvivors or ſurvivor attaining the age of twenty-one years or marriage or marriages aforeſaid, then the ſame to go to the legal repreſentative of the ſaid *Edward Knight*.

It was then declared, that the condition of the bond was, that, if *Edward Knight* ſhould perform the ſaid agreement, the obligation was to be void; otherwiſe to remain in full force.

A bill was filed by *Edward Knight* and his wife againſt *Donald Maclean* and *Anne* his wife, and other perſons; praying, among other things, an account of the perſonal eſtates of *Richard Glover* and *Elizabeth Moulton;* and that an agreement between the plaintiffs and *Maclean* and his wife might be performed; and that an account might be taken of the money due from them to the plaintiffs.

By the decree made in that cauſe the accounts were directed.

Edward Knight died upon the 7th of *June* 1790. By his will, dated the 4th of *May* 1786, he gave to his wife *Olive* all his houſehold furniture, and all his plate, linen, china, and books, for her own uſe; and as to the reſidue of his real and perſonal eſtate, he gave, deviſed, and bequeathed, the ſame to *John Rutter*, his heirs and aſſigns for ever, upon truſt to pay the rents and profits of his meſſuages, lands, and premiſes, to his ſaid wife for life, for her own ſeparate uſe; and after her deceaſe, upon truſt to make ſale of the ſame premiſes, and pay the monies ariſing thereby to and among his brother and ſiſter, nephews and niece, ſhare and ſhare alike, if then living; and he alſo gave, deviſed, and bequeathed, all and every his real and perſonal eſtate and effects, goods and chattels, ſtock in trade, whatſoever and whereſoever, and of what nature or kind ſoever, not before diſpoſed of, to *John Rutter*, upon truſt to ſell all his real and perſonal eſtate, and ſuch goods and chattels as ſhould not conſiſt of money or ſtock, and collect his debts, and lay out the money ariſing from the ſale, and likewiſe ready money at his death, if any ſhould remain after paying his legacies, upon Government ſecurity, and that he ſhould ſtand poſſeſſed of the ſaid real and perſonal eſtates, *&c*, upon truſt to apply the dividends and intereſt unto his ſaid wife *Olive* for and during the term of her natural life, to her own ſeparate uſe; and from and after her deceaſe, upon truſt, that *Rutter*, his heirs, executors, *&c*, ſhould, as ſoon after her deceaſe as might be, apply and diſpoſe of, as well the ſaid monies, that ſhould ariſe by the ſale of the freehold meſſuages, lands, and premiſes aforeſaid as alſo of all his real and perſonal eſtates and effects, goods, and chattels, monies, and Government ſecurities, aforeſaid, to and among his ſaid brother and ſiſter, nephews and niece, ſhare and ſhare alike, as tenants in common, and not as joint-tenants; and he appointed *John Rutter* ſole executor.

In *Auguſt* 1792 *Olive Knight* married *Thomas Wright*; who in in *Auguſt* 1795 became a bankrupt.

This bill of revivor and ſupplement was filed by *Rutter*, executor of *Edward Knight*, againſt the widow and adminiſtratrix of *Maclean*, and the aſſignees of the bankrupt; praying, that the ſuit inſtituted by *Knight* may be revived; and that the aſſignees may ſet forth, what right or intereſt they claim in a moiety or any other part of the perſonal eſtate of *Richard Glover*.

The aſſignees of the bankrupt by their anſwer ſtated, that they believed, *Edward Knight* poſſeſſed himſelf of ſome part of the reſidue of the perſonal eſtate of *Glover*; and that after the execution of the bond he at different times ſold different parts of the ſaid real eſtate. They ſet forth the aſſignment, by indentures, dated the 10th of *July* 1783, by *Knight* and his wife to *Rutter*, of a moiety of two ſums due to the eſtate of *Glover*, and of all the reſidue of the perſonal eſtate of *Glover*, and all their eſtate, title, right, and intereſt, under the wills of *Richard Glover* and *Elizabeth Moulton*; which aſſignment formed the ſubject of the cauſe of *Wright* *Rutter*, and they ſtated the anſwer of *Rutter* in that cauſe, admitting, that there was no conſideration for that aſſignment.

The anſwer then ſuggeſted, that the ſaid deed of aſſignment did not veſt the ſaid moiety of the reſidue of the perſonal eſtate of *Glover* in *Edward Knight*; but that upon his death being a *choſe in action* not reduced into poſſeſſion by him in his life it ſurvived to his wife; and they ſubmitted, that the bankrupt in right of his wife became intitled to all the ſaid moiety. The anſwer alſo ſtated, that the decree made by the Maſter of the Rolls in the cauſe of *Wright* v. *Rutter*, that the plaintiff *Olive Wright* ſhould elect to take under the will of *Edward Knight*, or the moiety of the perſonal eſtate of *Glover*; and, that at the time of that decree *Wright* was inſolvent, and, the defendants believe, had committed an act of bankruptcy: but his creditors were prevented from taking out a commiſſion of bankruptcy by his repreſentations, that he ſhould receive a conſiderable ſum of money from the ſaid ſuit, and would apply it in payment of his debts: but the perſon concerned for *Wright* and his wife knowing, that the perſonal eſtate of *Glover* would, if recovered, be liable to his debts, and that the benefit, *Olive Wright* took under the will of her firſt huſband, was given to her ſeparate uſe, elected on behalf of the plaintiffs in that cauſe to take under the will of *Edward Knight*; in conſequence of which the Maſter of the Rolls diſmiſſed the bill.

The defendants farther ſtated, that they believed, the bond of *Edward Knight* did not appear in that cauſe; and the fact of ſuch bond having been executed was concealed from the Court; and they claimed the moiety of the perſonal eſtate of *Glover* under the bankruptcy.

Solicitor General and Mr. Graham for the plaintiffs.—This cauſe is brought on with a view to ſee, whether your Lordſhip will agree with the opinion of the Maſter of the Rolls in the cauſe of *Wright* v. *Rutter* (*ante*, vol. 2. 673), which aroſe upon the tranſactions between theſe parties, that this is a caſe of election. The bond executed by *Edward Knight* in 1782 did not appear in that cauſe. The aſſignees of the bankrupt inſiſt only, that this was done in ſome degree in fraud of the creditors of *Wright*; and that they have a right to inſiſt, that this election is not binding, and they are at liberty to claim in right of the bankrupt's wife under the will of *Glover*; alſo, that, this bond not having been diſcloſed, ſhe was not aware of what ſhe was about at the time of her election. The bond did not occur to any of the parties at the time; and was not mentioned. That might have given her a right to inſiſt, that ſhe was not aware of all the circumſtances: but, notwithſtanding that, this is a clear caſe of election. *Knight* underſtood this to be a property he had a right to diſpoſe of. The only queſtion is, whether the aſſignees of the bankrupt have a right to control what his wife did?

Attorney General and Mr. Romilly for the defendants, the aſſignees of the bankrupt—The aſſignees claim, ſubject to the equity of the wife (*a*); unleſs they are barred by what has happened in the other ſuit. The bond takes the caſe out of the principle, that would form a caſe of election; and the will itſelf does not create a caſe of election. The bond is, that he ſhall by his will give her as much as he ſhall take from her by act in his life with regard to thoſe real eſtates. If he gives her no more than what ſhe was entitled to by the bond, it is not a caſe of election: it cannot operate as a purchaſe of that part of the eſtate, that by the bond is her own. It may be a ſatisfaction. The defendants deny, that any thing more is given her by the will than ſhe is entitled under the bond. There being no ſurplus beyond what the bond ſecures to her, the teſtator can only be conſidered as meaning a ſatisfaction of that, which he had taken from her, not, as propoſing a caſe of election.

As to the next conſideration, upon the will itſelf the words "*my* perſonal eſtate" never raiſe a caſe of election as to *choſes in action* of the wife, which the huſband had not aſſigned for valuable conſideration, or otherwiſe reduced into poſſeſſion. The words of this will "*all my real and perſonal eſtate*" do not comprehend the property, that is her's; and therefore are not enough to raiſe a caſe of election. *Read* v. *Crop* (*b*). If election is applied to this caſe, it will be carrying the doctrine of election much farther than it has ever gone. Suppoſe, a teſtator had by fraud prevailed upon another perſon to execute a deed conveying an eſtate to the teſtator; who afterwards by will, without adverting to that, gives ſomething to that perſon, and diſpoſes of all his eſtate by general words: could that be a caſe of election; and could that perſon be prevented from ſetting aſide that deed? The Maſter of the Rolls in the cauſe of *Wright* v. *Rutter* conſidered the deed, that had been executed by *Knight* and his wife, as a nullity. This property

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(*a*) The equity of the wife to a proviſion out of her equitable intereſt, as againſt the general aſſignees under a commiſſion of bankruptcy againſt her huſband or a general aſſignment for the benefit of his creditors, whether plaintiffs or defendants, is now eſtabliſhed by *Prior* v. *Hill*, 4 *Bro. C. C.* 139. *Burdon* v. *Dean*; *Oſwell* v. *Probert*; *Brown* v. *Clark*; *Freeman* v. *Parſley*, *ante*, vol. 2. 607. 680. Vol. 3. 166. 421.

As to an aſſignment by the huſband for valuable conſideration, ſee *Franco* v. *Franco*, the preceding caſe.

(*b*) 1 *Bro. C. C.* 492.

therefore ceaſed to be his perſonal eſtate. He never was in poſſeſſion of it. Suppoſe, it was proved, that he had gone to the perſon, who was accountable for the property, and had been informed, that it ſhould be paid, and that he had died in the interval, with a will in theſe general words: that alſo would be a caſe of election upon this ground, that it was evidence of his intention to diſpoſe of it.

Solicitor General in reply—*Finch* v. *Finch* (*a*), is in conformity to the determination upon General *Pulteney*'s will (*b*). The ſame principle muſt apply to this caſe. Mrs. *Knight* was a party to the aſſignment; and they thought, they had done it effectually. Under that impreſſion conceiving the property to be his, her firſt huſband makes his will.

Lord Chancellor.—If this is a ſerious point, you muſt bring the decree in the cauſe of *Wright* v. *Rutter* before me. An inſtrument, that ought to have been before the Maſter of the Rolls, was not before him.

But the effect of the bond is only conſtituting the wife a creditor upon the eſtate of her huſband: but as ſhe is alſo deviſee, ſhe muſt elect. The bond does not make it the leſs a caſe of election; and with reſpect to that ſhe may judge for herſelf, whether ſhe will take what is given, or claim againſt his will. A caſe of ſatisfaction always puts the party to a choice, whether he will ſubmit to the will, or claim againſt it. The party, to whom the election is put, has a full right to chooſe the worſt. I do not know, how the aſſignees of the bankrupt can fight on behalf of the wife againſt her will. I have a great partiality in favour of the argument of the Attorney General and Mr. *Romilly*, that, where a man diſpoſes of all his eſtate, it is not a fair inference, that he means to diſpoſe of what is not his eſtate; for I had perſuaded myſelf, as it was ſtrongly contended in the caſe upon General *Pulteney*'s will, that, the teſtator diſpoſing of *his* eſtate, the words were ſatisfied amply by his having a very large eſtate; and he could not mean to affect Mrs. *Pulteney* by his will; he could

See 6. Ves. Jun. 322.

(*a*) *Ante*, vol. 1. 534. 4 *Bro. C. C.* 38.

(*b*) Lady *Cavan* v. *Pulteney*, *ante*, vol. 2. 544. Vol. 3. 384. See alſo, upon the doctrine of election, *Blake* v. *Bunbury*, *ante*, vol. 1. 514.

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not mean to propoſe an election between the eſtate tail under the old family ſettlement, and that large eſtate, which was his own. But the determination was directly the contrary (*a*). The opinion of the Court was, that, as he took that to be his eſtate, ſhe muſt elect. All, that is to be conſidered, is, whether there is an implied condition upon the whole will, not, as to the right to the eſtate. Lord Chief Juſtice *De Grey* would not put it upon an implied condition; but conſidered it as a natural equity.

In this caſe it is clear, the huſband having taken this intereſt ineffectually from his wife concluded, he had it; and diſpoſing of his eſtate he meant to diſpoſe of all, that he had by right or by wrong, by good or bad title. As to his not having poſſeſſion, this property coming from *Glover* was ſo entangled in ſuits, that it was impoſſible for him to get at it. They agreed, it ſhould be the huſband's; and they ſuffered a recovery of the real eſtate, which they could get at. Then they contrived this deed; which they thought would give him the perſonal property; and he relied upon that. I ſee the intention of the wife to give it to her huſband.

Upon the principle, that the election was valid, the decree gave directions for taking the accounts, &c.

(*a*) See *ante*, vol. 2. 560. Vol. 3. 530.

April 16th.

SHARPE *v.* The Earl of SCARBOROUGH.

An equity of redemption is not equitable aſſets, at leaſt, as againſt judgment creditors; who have a right to redeem.

Aſſets are not marſhalled againſt judgment creditors.

THE late Earl of *Scarborough* by his will, dated the 26th of *June* 1772, gave to the Counteſs of *Scarborough* a legacy of 1000*l.*, and to his ſon Lord *Lumley* all his gold plate, books, pictures, houſehold goods, and furniture of his houſes in town and country; and he gave to Lady *Scarborough*, Sir *George Saville*, and *John Hewitt* 40,000*l.*, upon truſt for the benefit of his younger children; and all the reſidue of his perſonal eſtate, ſubject to his debts, funeral and teſtamentary expences, he bequeathed to his ſon Lord *Lumley*; and for the better effectuating the purpoſes aforeſaid he directed his truſtees to get in all arrears and monies due to him, and to ſell all his perſonal eſtate, that was ſaleable, except

what

what was given to his ſon; and out of the monies ariſing by the means aforeſaid to pay all his debts, funeral and teſtamentary expences, and to pay the ſaid 1000*l.* to Lady *Scarborough*, and retain the ſaid 40,000 *l.* upon the truſts therein mentioned, and pay the ſurplus to his ſaid ſon; and he appointed his ſaid truſtees executrix and executors; and he deviſed all his real eſtate at *Wintringham*, except the advowſon of the pariſh church there, and at other places in *Lincolnſhire*, to his ſaid truſtees, their executors and adminiſtrators, for 500 years, upon the truſts after mentioned; and he deviſed all the premiſes compriſed in the ſaid term (but ſubject thereto), and all the advowſon of the pariſh church of *Wintringham*, and all other his real eſtate, to his ſon Lord *Lumley*, his heirs and aſſigns for ever; and he declared, that his ſaid truſtees ſhould ſtand poſſeſſed of the ſaid term upon truſt by the profits thereof, or by mortgage, ſale, or other diſpoſition thereof, to raiſe ſuch ſum as his perſonal eſtate ſhould be deficient for payment of his debts, funeral and teſtamentary expences, and the ſaid legacies of 1000*l.* and 40,000*l.* with intereſt at the rate of 4 *per cent.* from ſix months after his deceaſe, if not paid before; and he declared, that after all the truſts of the ſaid term ſhould be performed the term ſhould ceaſe.

The teſtator died upon the 22d of *May* 1782.

The bill was filed by creditors; and by the decree made upon the 12th of *December* 1782 the proper directions were given for taking the accounts, and for ſale of the eſtates compriſed in the term &c. By another decree made upon a rehearing on the 24th of *May* 1792, upon a diſcovery, that the teſtator died ſeiſed of ſome real eſtates not compriſed in the term of 500 years, an enquiry was directed as to that; and by conſent thoſe eſtates were ordered to be ſold.

The eſtate at *Wintringham* was ſubject to mortgages; which were paid out of a fund in the Bank, ariſing from the ſale of the real eſtates not compriſed in the term, and alſo of the inheritance of the eſtates compriſed in the term; Lord *Scarborough* having conſented to a ſale of the inheritance inſtead of the term.

By the Maſter's report it appeared, that the judgment debts of the teſtator at his death amounted to 5,772*l.* 5*s.* 2*d*; and a judgment

ment for 755 *l.* had been ſince obtained. The bond debts were 142,053 *l.* 11 *s.* 7 *d*; and the debts by ſimple contract, 20,796 *l.* 11 *s.* 9 *d.*

The perſonal eſtate conſiſted of 3,304 *l.*, a balance of caſh in the hands of Lord *Scarborough*, 500 *l.* 7 *s.* 10 *d.* in the hands of another perſon, and 1900 *l.* due upon bond and turnpike ſecurities.

The cauſe coming on for farther directions, two queſtions were made: Firſt, whether the judgment creditors had a priority with regard to the produce of the equity of redemption of the eſtates in mortgage at the death of the teſtator, or whether that was to be treated as equitable aſſets: Secondly, If the equity of redemption was not to be conſidered as equitable aſſets, whether the ſimple contract creditors were not entitled to ſtand in the place of the judgment creditors as to ſo much of the perſonal eſtate as ſhould be exhauſted by them.

Attorney General and Mr. Ainge for the ſimple contract creditors.—In *the caſe of the creditors of Sir Charles Cox*, 3 *P. Wms.* 341; and *Hartwell* v. *Chitters*, *Amb.* 308. the equity of redemption was held equitable aſſets. The legal eſtate being in the mortgagee, the debtor had only an equity. There is nothing, upon which a judgment could attach. They ought therefore to come in *pari paſſu*.

Upon the ſecond point, the right of the ſimple contract creditors to ſtand in the place of the judgment creditors may be inferred from *The Earl of Winchelſea's caſe*, 3 *P. Wms.* 399, *n*.

Solicitor General for the judgment creditors; and Mr. Lloyd for Lord Scarborough.—As to the firſt point, the judgment creditors have a right to redeem the mortgage; and the teſtator's having only an equitable intereſt makes no difference. The common caſe of tacking a judgment to a mortgage ſhews the lien. There is no difference between a judgment creditor and a ſubſequent mortgagee, but that the latter has a particular lien, the former, a general lien upon the whole eſtate. This queſtion is perfectly decided in favor of the judgment creditors. Some doubt was formerly

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formerly entertained upon the point; *Child* v. *Stephens* (*a*); and it was left in a great degree of confuſion: but that was put an end to afterwards; particularly in *Symmes* v. *Symonds* (*b*); which is a branch of the cauſe of *The Earl of Briſtol* v. *Hungerford* (*c*). That caſe was referred to, and the point was very much agitated, in *Tempeſt* v. *Sabine* (*d*) in *Chancery*, *January* the 14th 1745; and it was held in that caſe, and in *William* v. *Spearman*, before Lord *Hardwicke* in 1739, that all incumbrances are to be paid according to their priorities. Judgment creditors are not analogous to ſpecialty creditors. They have no lien upon the land, except as aſſets againſt the heir or deviſee; and the *Statute* (*e*) having excepted deviſes for payment of debts (*f*), the ſpecialty creditors in that caſe have no right againſt the eſtate, whether it was an equity of redemption or a legal eſtate. Therefore as to that the Court ſays, if they take out of real aſſets deſcended or the perſonal eſtate a ſatisfaction, they ſhall not have the benefit of the proviſion made by the teſtator for the payment of his debts, till they make the other creditors equal with them (*g*). That was in ſome degree noticed in *Symmes* v. *Symonds*. There they claimed nothing under the proviſion for payment of debts, but only by virtue of their judgment. *The caſe of Sir Charles Cox's creditors* and *Hartwell* v. *Chitters* have been conſidered as overruled. According to them every decree in the common adminiſtration of aſſets in this Court is wrong. If leaſehold eſtates are ſubject to mortgages, there is no conception, that creditors by ſpecialty have not a right to come upon the produce of them, ſubject to the mortgages. The equity of redemption of a leaſehold eſtate is clearly aſſets at law; and the executor is charged there with the difference between the value of the eſtate and the ſum he paid in the redemption of it. In the caſe of a mortgage of a freehold eſtate the equity of redemption is aſſets at law; and it cannot be ſuggeſted, that the ſpecialty creditors are not entitled to their remedy againſt thoſe eſtates deſcended as legal aſſets; though they cannot be got at but through the medium of a court of Equity.

That is, the specialty cred.?

(*a*) 1 *Vern.* 101.

(*b*) 1 *Bro. P. C.* 66.

(*c*) 2 *Vern.* 524.

(*d*) The Solicitor General cited this caſe from a manuſcript note by Mr. *Browne*, the King's counſel.

(*e*) 3 & 4 *Will. & Mary*, *c.* 14.

(*f*) As to the conſtruction of that clauſe ſee *The Earl of Bath* v. *The Earl of Bradford*, 2 *Veſ.* 590. *Lingard* v. *The Earl of Derby*, 1 *Bro. C. C.* 311. *Hughes* v. *Doulben*, 2 *Bro. C. C.* 614.

(*g*) *Haſlewood* v. *Pope*, 3 *P. Wms.* 322. the third point.

The ſecond queſtion is raiſed upon a ſort of equity, that, if theſe judgment creditors claim to be paid out of the land, they are not to have the perſonal eſtate applied to their demands. There can be no pretence for that. The common direction in every decree as to marſhalling the aſſets expreſsly mentions ſpecialty creditors; but does not refer to judgment creditors.

LORD CHANCELLOR.—In the caſes cited upon the firſt point, the equity of redemption was in the debtor: but a judgment creditor has a right to redeem. Where there is a mortgage, then a judgment, and then a ſecond mortgage, the judgment creditor may redeem the firſt mortgage. *The caſe of the creditors of Sir Charles Cox*, whether it is right or wrong, applies to bond creditors only, not to judgment creditors.

The directions muſt be given upon the principle, that the judgment creditors are to be paid in the firſt inſtance.

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HOWSE v. CHAPMAN.

Bequeſt for the improvement of the city of *Bath*, conſtrued to mean improvements carrying on under an act of parliament, not by private perſons.
Specific diſpoſition by will in truſt to ſell, and in the firſt place pay debts, legacies, and charges of probate and execution of the truſt, and in the next place, that the reſidue of the money be appropriated to the improvement of the city of *Bath*, is void by *ſtatute* 9 G. 2. *c*. 36. as to a navigation ſhare, which being real eſtate goes to the heir, and as to money on real ſecurities, as mortgages, turnpike bonds, and commiſſioner's bonds for the improvement of the city of *Bath*; which go to the next of kin: the general reſidue undiſpoſed of was firſt applied to the debts and other charges; and the deficiency was born by the truſt property, that paſſed to the city of *Bath*, and that, of which the diſpoſition failed by the *ſtatute*, *pro ratâ*.

LEONARD COWARD by his will, dated the 23d of *May* 1794, and duly executed to paſs real eſtate, after giving particular directions as to his funeral, and ſome legacies of 20*l*. each for mourning, gave to *Elizabeth*, the wife of *Thomas Baldwin*, her executors, adminiſtrators and aſſigns, his freehold houſe fronting the *North Parade* at *Bath*, as well as five commiſſioner's bonds for the improvement of the city of *Bath*, of 100*l*. each, to be paid within the year, having them in his poſſeſſion; that her huſband have no control or power over the ſaid houſe and bonds; but that it ſhall be in her ſole diſpoſal, to do with it as ſhe ſhall think proper, for ever. He gave to *Mary Chapman* a houſe and five other commiſſioner's bonds for the improvement of the city of *Bath*, of 100*l*. each, to be paid within the year, having them in his poſſeſſion, to be her ſole property for ever; and he gave to

Anne Chapman a houſe and five other Commiſſioners' bonds for the improvement of the city of *Bath* in the ſame manner.

The teſtator then, after giving ſome ſpecific and pecuniary legacies and annuities, (ſome of which were given to charities,) and among them four corporation bonds for 500*l.* each, ordered all his plate to be ſold upon the beſt terms and without reſerve by auction or otherwiſe; as alſo one ſhare of the *Bath* Navigation, if not diſpoſed of before his death, and all the furniture of his houſe, utenſils and implements of houſehold, goods, linen, china, (except the ornamental jar, books, and book-caſe, herein before given to *George Redmond*,) and pictures, (except ſome prints and pictures, which belonged to the late Mr. *Redmond*, among whoſe family the teſtator directed them to be divided). Then after giving to the two ſervants, who are and ſhall be living with him at his deceaſe complete mourning and all his wearing apparel under every deſcription, to be equally divided between them, and to each of them a legacy of 200*l.* to be paid in twelve months after his deceaſe, the teſtator proceeds thus:

“ And my farther will is, that my executors in truſt hereinafter
“ named do collect together all the money ariſing from the ſale of
“ the furniture of my houſe, plate, and one ſhare of the *Bath*
“ navigation, if not diſpoſed of before my death, as well as all
“ ſecurities for money, mortgages, corporation bonds, in the funds,
“ in the *Milſom Street* bank, turnpike bonds, Commiſſioners'
“ bonds for the improvement of the city, *Eaſt India* bonds, and
“ by and out of the monies ſo ariſing in the firſt place pay and diſcharge
“ my juſt debts, legacies, funeral expences, and charges
“ attending the probate and execution of the truſts of this my
“ will; and that Mr. *Smith*, Notary Public, be employed in the
“ proving of my will, and in every other reſpect, where his
“ advice ſhall be neceſſary; and in the next place my will is, that
“ the reſidue of the money be appropriated to the improvement of
“ the city of *Bath*, and be placed by my executors in the bank of
“ Meſſrs. *Hobhouſe*, *Clutterbuck*, *Phillott*, and *Lunder*, in this city,
“ at the rate of 3*l. per centum pet annum*; and that it ſhall be
“ drawn out of the ſaid bank as the improvements ſhall require.”

The teſtator then directed, that his nameſake *Thomas Coward* ſhould bury him, and find mourning; and declaring, that now having made his will, and diſpoſed of his effects agreeable to his own inclination, though perhaps not to the parties concerned, he appointed executors.

In *June* 1795 the teſtator entered into a contract for the ſale of the houſe fronting the *North Parade* to *Charles Gunning* for the ſum of 1050*l.* The teſtator died upon the 25th of *November* 1795.

Upon the bill of the executors praying, that the will may be eſtabliſhed, and the rights of the parties to the real and perſonal eſtate of the teſtator be aſcertained, and that the contract for the ſale of the houſe to the defendant *Gunning* may be performed, and that directions may be given for the application of the purchaſe-money, two points were made.

The heir at law and next of kin inſiſted, Firſt, that the diſpoſition of the reſidue for the improvement of the city of *Bath* was void for uncertainty, upon the ground, that great improvements were carrying on in that city by private individuals as well as by the Commiſſioners under the *Statute* 29 *Geo.* 3. for the improvement of the city:

Secondly, That if that diſpoſition was not void on that ground, it was void under the *ſtatute* 9 *Geo.* 2. *c.* 36. as to all ſuch parts of the reſidue, as are of the nature or conſiſt of real property.

By the decree made upon the 20th of *November* 1797, the will was eſtabliſhed, and the truſts were directed to be carried into execution except as to the money ſecured upon real eſtate. It was directed, that the contract for the ſale of the houſe ſhould be carried into execution; and that the money to ariſe by the ſale ſhould be conſidered as perſonal eſtate undiſpoſed of by the will, and be paid into the bank; and it was declared, that the *Bath* navigation ſhare mentioned in the will belonged to the defendant *John Chapman*, the heir at law of the teſtator (*a*).

An account of the perſonal eſtate was directed; and the Maſter was directed to ſtate the particulars, of which the perſonal

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(*a*) See *Buckeridge* v. *Ingram*, *ante*, vol. 2. 652.

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eſtate conſiſted at the death of the teſtator, and to diſtinguiſh particularly, how the ſame was ſecured and placed out at his deceaſe, and how it had been applied and diſpoſed of. Accounts of the debts, funeral expences, legacies, and annuities, were directed; and it was ordered, that the perſonal eſtate ſhould be applied in a courſe of adminiſtration; and that an appropriation ſhould be made to anſwer the annuities. The coſts of all parties were ordered to be taxed; and the conſideration of farther directions was reſerved.

By the Maſter's report it appeared, that the general reſidue of the perſonal eſtate, not ſpecificially diſpoſed of, conſiſted of ſome caſh in the houſe at the teſtator's death, the money produced by the ſale of the houſe to *Gunning*, a debt due to the teſtator, and ſome articles of inconſiderable value not enumerated in the will.

That part of the perſonal eſtate, which was held not to paſs by the bequeſt for the improvement of the city of *Bath*, conſiſted of mortgages to the amount of 4950*l.*, five bonds of the Commiſſioners for the improvement of the city of *Bath*, four bonds of the corporation of *Bath*, and four bonds of the Commiſſioners of a turnpike (*a*).

The cauſe coming on for farther directions, a point was made on behalf of the next of kin, that the debts, legacies, and funeral expences, and the coſts of all the parties, except the defendant *Gunning*, (who had purchaſed the houſe in purſuance of the contract, and whoſe coſts were paid out of the purchaſe-money,) were to be paid in equal ſhares and proportions out of the perſonal eſtate bequeathed for the improvement of the city of *Bath* and the perſonal eſtate undiſpoſed of.

Solicitor General, and Mr. Grant for the next of kin, one of whom, the defendant John Chapman, was alſo heir at law of the teſtator,— In *The Attorney General* v. *The Earl of Winchelſea* (*b*) the general rule was eſtabliſhed upon conſideration of all the caſes, that, where

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(*a*) See *Knapp* v. *Williams* in the note to *Corbyn* v. *French, ante,* 430 as to turnpike ſecurities; and as to mortgages, *Attorney General* v. *Meyrick,* 2 *Veſ.* 44. *Pickering* v. *Lord Stamford, ante,* vol. 2. 272. 581. Vol. 3. 332. 492.

(*b*) 3 *Bro. C. C.* 373.

a reſidue is left for charitable purpoſes, including mortgages and other intereſts, that cannot go to the charity, the debts and legacies ſhall be paid out of the two parts of the eſtate *pro ratâ*. A diſtinction is attempted in this caſe, becauſe the teſtator has not given all his perſonal eſtate. Several articles are enumerated; and as to the funds ariſing from real ſecurities the decree has declared the diſpoſition void: but there are other articles not enumerated; which are claimed by the next of kin as undiſpoſed of. The will has directed the debts, legacies, funeral expences, and the charges of the probate and the execution of the truſts, to be paid ſpecificially out of this particular fund intended for the improvement of the city. The reſidue undiſpoſed of was therefore intended to go to the next of kin free from thoſe charges; and as to ſo much as cannot paſs to the charity there ſhould be the ſame appropriation as in *The Attorney General* v. *The Earl of Winchelſea*; each fund bearing its proportion *pro ratâ*. It muſt either be ſaid, the teſtator forgot there were other articles, and meant that to be a reſiduary diſpoſition, which the Court has already determined not to be reſiduary, or that by directing payment of thoſe charges to be made out of this particular fund he meant nothing. That expreſs direction muſt have the effect of exonerating all other funds. As to real eſtate, it is clear, if a teſtator ſelects part of his property for this purpoſe, as in *Powis* v. *Corbet* (*a*) and *Donne* v. *Lewis* (*b*), and leaves an eſtate to deſcend, he has declared his intention in favor as well of the heir as the deviſee, that the particular property directed to be applied in ſatisfaction of the debts, &c, ſhall be ſo applied.

There is no doubt, this particular fund is amply ſufficient for theſe burthens impoſed upon it. It is not a mere charge, but a gift to the executors, in truſt to diſpoſe of the property, and out of the money ſo ariſing in the firſt place to pay and diſcharge the debts, legacies, funeral expences, and charges of the probate and of the execution of the truſts, and in the next place, that the reſidue be appropriated to the improvement of the city of *Bath*. Several expreſſions can have no meaning, unleſs this ſpecific fund is to bear theſe charges. Nothing but the reſidue of that fund after ſatisfying thoſe charges is to be appropriated. The city of

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(*a*) 3 *Atk.* 556. See that caſe ſtated from the Regiſter's book, *ante*, vol. 3. 116. n.
(*b*) 2 *Bro. C. C.* 257.

Bath inſiſt, they are to have the whole; which will have the effect of throwing theſe charges upon the general reſidue. The defendant *Chapman* does not contend, that the navigation ſhare he takes is not to bear ſome part. The apportionment in *The Attorney General* v. *The Earl of Winchelſea* is the proper courſe.

As to the legacies there is no claim but in the particular manner the teſtator has given them; according to the diſtinction taken in *Hone* v. *Medcraft* (a). With reſpect to them this fund muſt contribute rateably, even if any diſtinction could be made as to the debts.

Attorney General Mr. Manſfield and Mr. Graham for the defendant, the Clerk of the Commiſſioners for the improvement of the city of Bath—*The Attorney General* v. *The Earl of Winchelſea* has no relation to this queſtion between perſons entitled to this fund for the benefit of the city of *Bath* as ſpecific legatees, and thoſe claiming the general reſidue, firſt, becauſe ſomething is given for the benefit of the city, which cannot paſs, ſecondly, becauſe the teſtator has omitted ſome particulars in the enumeration of the articles to be applied for the benefit of the city. In that caſe there was a general reſidue given to a charity, which comprehended certain things, which could not be given for that purpoſe; and in order to pay the debts and legacies that apportionment was taken as the rule.

The queſtion in this caſe is, whether, where there is a ſpecific bequeſt to a charity, and a reſidue undiſpoſed of, which the next of kin take by operation of law, not under the will, they have a right to ſay, they ſhall take that part of the perſonal eſtate, which is undiſpoſed of, free from the debts, legacies, and other charges. The legacies are in exactly the ſame caſe as the debts; for they are general legacies; though there is in this diſpoſition for the benefit of the city of *Bath* a direction for paying the legacies as well as the debts. If the whole reſidue was given for the city, the rule adopted in *The Attorney General* v. *The Earl of Winchelſea* muſt be applied: but this is not, as in that caſe, a diſpoſition of a general reſidue, ſome parts of which happen not to be effectually given: but the general reſidue conſiſts of two ſpecies: ſo much of the perſonal eſtate, of which no diſpoſition is attempted,

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(a) 1 *Bro. C. C.* 261.

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tempted, and ſo much as was comprehended in the gift of the city of *Bath*, but was not effectually carried by that gift. The debts and legacies are to be paid out of the reſidue; and there can be no foundation for diſtinguiſhing a gift falling into the reſidue by the effect of the *Statute* (*a*), ſo as to throw any part of the debts and legacies upon the ſpecific legacies well given to the city. This is not like marſhalling. There cannot be a marſhalling of aſſets for a charity, I admit (*b*). If this fund is ſpecifically given to the city, the former decree has ſhut out the queſtion.

The will gives nothing to the next of kin. It is purely the diſpoſition of the law. Then is there any caſe, where the next of kin taking the reſidue by inteſtacy have taken it free from the debts and legacies, given generally, againſt a ſpecific gift of the perſonal eſtate, merely becauſe that is given after payment of the debts and legacies? *Gray* v. *Minnethorpe* (*c*) is directly contrary to ſuch a claim. In that caſe your Lordſhip held, that if an executor takes the perſonal eſtate by the office of executor, without a truſt, it ſhall not be free from the debts, merely becauſe another fund is ſubjected to the debts. As to the real eſtate the rule is very clearly laid down by the Maſter of the Rolls in *Manning* v. *Spooner* (*d*), that the order of application to the debts is, firſt, the general perſonal eſtate, unleſs exempted expreſsly, or by plain implication: ſecondly, any eſtate particularly deviſed for the purpoſe, and only for the purpoſe, of paying debts: thirdly, eſtates deſcended: fourthly, eſtates ſpecifically deviſed: but his opinion was, that if a particular eſtate is deviſed for paying debts, but the intention is, that the ſurplus ſhall go to other perſons than the heir, then the deſcended eſtate ſhall be firſt applied. The next of kin in this caſe claim by no intention. Unleſs they ſhew an intention to exempt the reſidue of the perſonal eſtate from payment of the debts, they muſt take it ſubject to them. There can be no doubt from the very particular enumeration, the teſtator thought he had diſpoſed of the whole reſidue: but he happened not to mention all, and not to throw in the general words "*all my perſonal eſtate.*" It muſt therefore be conſidered, as it was upon the former hearing, a ſpecific bequeſt. Conſidering it ſo, the legacies would not have been charged, if he had not uſed words charging them. This is the firſt inſtance of ſuch a claim.

(*a*) 9 *Geo* 2. *c*. 36.
(*b*) *Mogg* v. *Hodges*, 2 *Veſ*. 52.
(*c*) *Ante*, vol. 3. 103.
(*d*) *Ante*, vol. 3. 114.

Solicitor General in reply—The caſes cited, where a deviſe of real eſtate for the payment of debts was held not to exonerate the perſonal eſtate, do not apply. But the queſtion is in principle that decided in *Powis* v. *Corbet* and *Donne* v. *Lewis*, both caſes upon real eſtates between the heir at law and particular deviſees; and the principle is, that, where a teſtator expreſsly appropriates a particular part of his real eſtate, that appropriation ſhall be taken to be for the benefit of the heir at law, as much as for the benefit of the deviſees of the other part of the real eſtate. *Powis* v. *Corbet* was determined by Lord *Hardwicke* in view of *Galton* v. *Hancock* (*a*); and the principle, which is confirmed by Lord *Thurlow* in *Donne* v. *Lewis*, applies thus: the teſtator has declared, that a particular part of his perſonal eſtate ſhall be a fund for payment of his debts, *&c*; and that what he has given to the legatee is only ſo much of that particular fund as ſhall remain after anſwering thoſe charges. Therefore it is a proviſion for the benefit of all the ſpecific legatees, and of thoſe entitled to that part of his perſonal eſtate, that is not compriſed in the will. He has given nothing but what remains of that fund after anſwering thoſe charges. This differs from *Gray* v. *Minnethorpe*, and the other caſes of that claſs; for this is a ſelection of a particular part of the general perſonal eſtate as a fund for theſe charges, and nothing is given but the ſurplus. What is contended for the City of *Bath*, that the general reſidue of the perſonal eſtate and the mortgages and other intereſts, that cannot paſs under the beqeſt to the city, are to be applied to the debts, *&c*, in the firſt place, is by circuity marſhalling aſſets in favour of a charity; a contrivance to throw the charges upon that part of the perſonal eſtate, which is ineffectually given, merely becauſe the teſtator has in the enumeration made by his will omitted ſome articles of inconſiderable value. *The Attorney General* v. *The Earl of Winchelſea* is in exact conformity to *Akeroyd* v. *Smithſon* (*b*) and the other caſes of that claſs (*c*).

Lord Chancellor—This beqeſt to the city of *Bath* of particulars enumerated is ſpecific. As to the general reſidue, muſt it not all be applied to pay the coſts? Are not the coſts of executing the

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(*a*) 2 *Atk.* 424.

(*b*) 3 *P. Wms.* 22. Mr. *Cox*'s note.

(*c*) *Digby* v. *Legard.* 3 *P. Wms.* 22. Mr. *Cox*'s note. *Robinſon* v. *Taylor*, 2 *Bro.* C. C. 589; *Ante*, vol. 1. 44. *Hutcheſon* v. *Hammond*. *Spink* v. *Lewis*, 3 *Bro.* C. C. 128; 355. *Ex parte Bromfield*, *ante*, vol. 1. 453. *Oxenden* v. *Lord Compton*. *Walker* v. *Denne*. *Lord Compton* v. *Oxenden*. *Chitty* v. *Parker*, *ante*, vol. 2. 69; 170; 261; 271. *Halliday* v. *Hudſon*, *ante*, vol. 3. 210.

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will always paid out of a reſidue undiſpoſed of? Is there a ſingle inſtance, where the coſts of the cauſe have not been thrown upon the undiſpoſed reſidue? I was ſtruck at firſt with the ſingularity of the next of kin raiſing a right to themſelves out of the conſtruction of a part of the will, that gives from them. How can the next of kin argue upon the intention of the teſtator in their favour?

Conſtruction upon the *Statute* of fraudulent deviſes.

There is no ſtrict analogy between a deviſe of land, creating a fund for the debts, and a reſidue of perſonal eſtate. Firſt, the land is not ſubject to ſimple contract debts. Secondly, it is a deviſe in favour of ſimple contract creditors. The ſpecialty creditor upon a deviſe for payment of debts muſt come in under the will (*a*).

This teſtator certainly intended to give every thing. The value of the articles omitted in the enumeration is very trifling: but he happened to ſell in his lifetime a real eſtate, which brings about 1000 *l.* to the perſonal eſtate. He had contracted to ſell it; and the Court has directed that contract to be carried into execution. They muſt give to the next of kin theſe things, the diſpoſition of which fails, becauſe the law will not ſuffer them to paſs: but the 1000 *l.*, which makes the general reſidue, muſt be applied in payment of the debts and other charges. It is exactly within the caſe of *The Attorney General* v. *Winchelſea* with regard to the mortgages and other things, that are taken out of the bequeſt, becauſe the law takes them out of it.

The decree directed the maſter to carry on the accounts, and to diſtinguiſh the general reſidue of the perſonal eſtate undiſpoſed of from the ſpecific particulars thereof bequeathed for the improvement of the city of *Bath*; to tax all parties their ſubſequent coſts, to be paid out of the ſum of 1048 *l.* 19 *s.* caſh in the bank, part of ſuch general reſidue; that the ſum of 395 *l.* coſts before taxed, and paid by the plaintiffs out of the general perſonal eſtate come to their hands, be repaid them; that the remainder of the ſaid ſum of 1048 *l.* 19 *s.* together with the remainder of the general reſidue of the teſtator's perſonal eſtate be applied in payment of his debts and

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(*a*) As to the conſtruction of the *Statute* of Fraudulent Deviſes, 3 & 4 *Will. & Mary*, c. 14. ſee *The Earl of Bath* v. *The Earl of Bradford*, 2 *Veſ.* 590. *Lingard* v. *The Earl of Derby*, 1 *Bro. C. C.* 311. *Hughes* v. *Doulben*, 2 *Bro. C. C.* 614.

funeral expences in a courſe of adminiſtration, and then in payment of his legacies, as far as the ſame will extend.

It was declared, that the bequeſt for the improvement of the city of *Bath* was a charitable bequeſt; and that the mortgages, the five bonds of the Commiſſioners for the improvement of the city of *Bath*, and the four bonds of the Commiſſioners of the turnpike did not paſs thereby, but are undiſpoſed of by the will, and belong to the next of kin of the teſtator. It was directed, that the maſter ſhould diſtinguiſh ſuch of the particulars of the perſonal eſtate ſpecifically bequeathed for the improvement of the city of *Bath*, as are well given and paſſed by each bequeſt from ſuch of the particulars as did not paſs thereby, that belong to the next of kin; and it was farther ordered, that the ſame be applied *pro ratâ* in payment of ſo much of the teſtator's debts, legacies, and funeral expences, and of ſo much of the coſts of this ſuit, as the general reſidue of the teſtator's perſonal eſtate undiſpoſed of by his will will not extend to pay; and it was directed, that ſuch particulars of the perſonal eſtate ſpecifically bequeathed for the improvement of the city of *Bath*, as did not paſs by the bequeſt for that purpoſe, be divided, after the payments thereout before directed, among the next of kin of the teſtator according to the *Statute of diſtribution*; and that ſuch particulars ſpecifically bequeathed for the improvement of the city of *Bath*, as are well given and paſſed by the bequeſt for that purpoſe, be, after the payments thereout before directed, paid, transferred, and delivered, to the defendant *John Sealy Lawton*, the Clerk to the Commiſſioners for the improvement of the city of *Bath*, to be applied, &c.

RUSSELL *v.* LONG.

Rolls.
April 22.

Words of ſurvivorſhip in a will ſhall not defeat the effect of words importing a tenancy in common; but ſhall be referred to ſome time, as the death of the tenant for life; or even to the death of the teſtator, though a conſtruction not to be adopted, if there can be any other.

GEORGE GARDEN being ſeized of real eſtate in the iſland of *Jamaica*, and poſſeſſed of a conſiderable perſonal eſtate, by his will, dated the 8th of *May* 1790, after giving ſome legacies, gave and deviſed all the reſidue and remainder of his real and perſonal eſtate, after payment of his debts, funeral expences, and legacies, to truſtees, and their heirs, executors, and adminiſtrators, in truſt that they ſhould ſell and diſpoſe of the whole of his reſiduary real eſtate and ſlaves, and ſhould place out and inveſt the monies ariſing in ſuch ſale, together with his reſiduary perſonal eſtate, in the houſe of Meſſ. *Long*, *Drake*, and Co. *London*; whoſe letter for the ſame ſhould indemnify his ſaid truſtees; and he thereby authorized and empowered the ſaid Meſſ. *Long*, *Drake*, and Co., to pay the ſame for the purpoſes after mentioned; namely, the yearly intereſt of the principal to be paid to the proper hands of his mother *Ann Garden*, then reſiding in *Edinbro'*, during the term of her natural life, for her ſole uſe and benefit; and after her deceaſe to pay, apply, and diſpoſe of, the whole ſum both principal and intereſt ariſing from the ſaid monies to be remitted, as aforeſaid, unto his three ſiſters *Chriſtian Garden*, *Iſabel Ann Garden*, and *Elizabeth Garden*, and the ſurvivors and ſurvivor of them during their natural lives, unto the proper hands of his ſaid ſiſters, and the ſurvivors and ſurvivor of them ſhare and ſhare alike, or otherwiſe to permit and ſuffer them, his ſaid ſiſters, and the ſurvivors and ſurvivor of them to receive and take the ſame in equal parts, ſhares, and proportions to and for their and her ſeparate uſe and benefit the ſurvivors or ſurvivor or their or her heirs for ever; and he appointed his truſtees executors.

The teſtator died ſoon afterwards; leaving his mother, and his ſiſters, who were his coheireſſes at law, ſurviving him.

Ann Garden, the teſtator's mother, died in *February* 1796. *Chriſtian Garden* died in *May* 1796, before any diſtribution of the teſtator's property. The bill was filed by the ſurviving executors under her will, dated the 23d of *December* 1793, claiming one-third of the capital under the will of her brother.

Mr. Grant and Mr. Sutton for the plaintiffs—The queſtion is, whether this will creates a joint tenancy or a tenancy in common in this reſiduary eſtate. It is clearly the latter; and the ſhares veſted in the three ſiſters upon the death of the teſtator. There have been many caſes of this ſort; and it has been uniformly held, that words of partition and equal diviſion always control words of ſurvivorſhip; for this plain reaſon, that a ſenſe may always be given to the latter by confining the ſurvivorſhip to ſome particular period, as the death of the teſtator or of the tenant for life; whereas the words of partition muſt remain inſenſible and without operation, if it is to be held a joint tenancy.

Lord Bindon v. *Lord Suffolk* (*a*) is always referred to upon this point: but it is not the earlieſt caſe. The reaſoning there, that the words of ſurvivorſhip were uſed to prevent a lapſe by the death of any in the teſtator's life-time, applies exactly to this caſe. The decree was reverſed, but not upon the ground that it was a joint tenancy, but that the Lord Chancellor had not properly conſtrued the words; the Houſe of Lords being of opinion, that the time referred to was, not the death of the teſtator, but the time of receiving the money; which was a debt due from the Crown of rather a deſperate nature. In *Haws* v. *Haws* (*b*) Lord *Hardwicke* ſtates that to be the ground of the reverſal (*c*). *Stones* v. *Heurtley* (*d*); *Bliſſet* v. *Cranwell* (*e*), there referred to; *Roſe* v. *Hill* (*f*); *Perry* v. *Woods* (*g*), in which your honour relied on *Stringer* v. *Philips* (*h*), a very ſtrong caſe. In *Roebuck* v. *Dean* (*i*) the Lord Chancellor ſaid, it was manifeſtly a tenancy in common upon the words "*equally to be divided.*"

The words in this will are "*ſhare and ſhare alike*" and "*in equal* "*parts, ſhares, and proportions.*" The principal as well as the intereſt being to be paid after the death of the mother, it is impoſſible to ſuppoſe the teſtator to mean a joint tenancy; a conſtruction, againſt which the Court always inclines. Unleſs the words of ſurvivorſhip are conſidered as relating either to the event of the death of the teſtator or of the tenant for life, both of which have happened, no meaning can be given to the word "*principal.*"

Mr. Campbell for the two ſurviving ſiſters, defendants—There is no inſtance, in which a teſtator has ſo frequently made uſe of the words "*ſurvivors or ſurvivor*" as in this will. It is clear he meant to give a joint intereſt; and the words "*ſhare and ſhare alike*" mean

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(*a*) 1 *P. Wms.* 96.

(*b*) 1 *Wilſ.* 165. 1 *Veſ.* 13. 3 *Atk.* 524. See the caſes collected in Mr. *Sanders*'s note.

(*c*) As to that caſe, ſee alſo *Brograve* v. *Winder*, *ante*, vol. 2. 634. and *Maberly* v. *Strode*, *ante*, vol. 3. 450.

(*d*) 1 *Veſ.* 165.

(*e*) 1 *Salk.* 226.

(*f*) 3 *Bur.* 1881.

(*g*) *Ante*, vol. 3. 204.

(*h*) 1 *Eq. Ca. Ab.* 292. 1 *P. Wms.* 97. Mr. *Cox*'s note.

(*i*) *Ante*, vol. 2. 265. 4 *Bro. C. C.* 403.

mean only that during the lives of the ſiſters they are to be paid the intereſt in equal proportions. After theſe words the teſtator again introduces words of ſurvivorſhip; and the concluding words of the ſentence are expreſsly deſcriptive of a joint intereſt. It is to be obſerved, that the property is to ariſe from the ſale of a *Weſt India* eſtate, which muſt in all probability take place at a diſtant time; and in that reſpect *Lord Bindon* v. *Lord Suffolk* applies very cloſely: the reaſon of the reverſal of Lord *Cowper's* decree being the nature of the debt; with reference to which the teſtator muſt have been looking to a ſurvivor at a diſtant period. This caſe differs from all but that; and that is in favour of the defendants. This reſidue cannot be collected but at a conſiderable diſtance of of time. It is a clear rule of conſtruction, that no word ſhall be rejected, if a ſenſe can be given to it. The word "*ſurvivor*" muſt be expunged from this will, unleſs the conſtruction of the defendants is adopted.

Mr. Grant in reply was ſtopped by the Court.

Maſter of the Rolls—I am very well ſatisfied upon this cauſe. It is admitted very properly, that wherever there are words plainly importing a tenancy in common, ſome conſtruction muſt be put upon the other inconſiſtent words, that ſhall, if poſſible, relate to ſome time or other, and not ſuch as would defeat and deſtroy the effect of the other words importing a tenancy in common. If no other ſenſe can be put upon them except ſurvivorſhip at the death of the teſtator, that muſt be the conſtruction, according to the caſe of *Stringer* v. *Philips*: though I rather think there was in that caſe another time to which thoſe words might have applied; *viz.* the deaths of *Lucy* and *Catherine*. But in this caſe as theſe ſiſters ſurvived both the teſtator and the tenant for life, a reference to neither of thoſe circumſtances will help the conſtruction. Lord *Thurlow* ſaid, a reference to the death of the teſtator is an unnatural conſtruction. The caſe of *Lord Bindon* v. *Lord Suffolk*, though coming from ſo high an authority, has been very much doubted, and very lately, in a cauſe (*a*) before the Lord Chancellor; and certainly, when the caſe and the ground of it are looked at, it does ſeem a very ſlender ground, upon which it was determined. But whether it is ſlender, or not, it is deciſive. Lord *Hardwicke* avers that to be the ground; and he was then in

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(*a*) *Roebuck* v. *Deane*, *ante*, vol. 2. 265.

conſiderable practice; and muſt have been in the cauſe. That ground does ſeem extremely refined; and perhaps it would hardly be adopted, if it was to be decided now: but it is deciſive of the principle; that you muſt, in order to reconcile the inconſiſtent words, find ſome æra, to which the words of ſurvivorſhip are to be referred. In this caſe there is nothing that in any degree points to the nature of the fund. It was rather hinted at than argued, and cannot poſſibly be contended, that it might be a joint-tenancy for life, with a remainder to the ſurvivor for ever. That cannot be; for he has actually continued it over beyond that term; and it is ſtill to be paid to them *&c*, the ſurvivors and ſurvivor; and all the words importing a tenancy in common are repeated.

Therefore upon theſe caſes, and principally upon *Stringer* v. *Philips* I am of opinion, there are but two æras, to which the ſurvivorſhip can be referred. If all theſe ſiſters had not ſurvived their mother, poſſibly I might have adopted the conſtruction, that it related to the death of the mother, and not of the teſtator; for I think, that conſtruction is not to be adopted, if any other can be.

Declare, that upon the death of *Chriſtian Garden* her third part of the teſtator's reſiduary eſtate paſſed under her will.

CHAWORTH *v.* BEECH.

Rolls,
April 18. 23.

Legacy of the money due upon a note held ſpecific, upon the intention: but the inclination of the Court is againſt ſpecific legacies, and to hold it a general legacy, with reference only to the ſecurity, as the fund firſt to be applied to it.

Specific legacy retained by the executor for aſſets; but was not wanted: in caſe of depreciation the legatee is entitled to the original value.

George Chaworth by his will, dated the 23d of *February* 1791, gave to *Sarah Hawkſley* and her aſſigns an annuity of 300*l.* for her life, excluſive of a bond, which he had that day given and entered into to her for the payment annually of the ſum of 200*l.* after his deceaſe; and he thereby charged the reſidue of his perſonal eſtate with the payment of the ſaid annuity of 300*l.* He alſo bequeathed to her the ſum of 200*l.* which he directed to be paid to her by his executors and truſtees within three months after his deceaſe; and after payment thereof and the ſeveral other legacies and annuities therein mentioned he gave and bequeathed all the reſt and reſidue of his perſonal eſtate and effects whatſoever and whereſoever to his executors, upon truſt for the ſole uſe of *Mary*

1799. CHAWORTH *v.* BEECH. *Anne Chaworth*, his only child, her executors and adminiſtrators for ever, to be paid to her, when ſhe ſhould attain her age of twenty-one years.

By a codicil, dated the 29th of *June* 1791 the teſtator made the following diſpoſition:

" Whereas I am poſſeſſed of or entitled unto the ſum of 8000*l.*, " which is veſted in the bank of Meſſrs. *Robert Smith*, *Samuel Smith*, " *Rene Payne*, and *John Smith*, of *Nottingham*, and for which ſum " payable with intereſt at 3 *per cent.* one month after ſight at *Nottingham*, I have the promiſſory note of the ſaid bankers, ſigned by " *Abraham Guinever*; and whereas I am alſo poſſeſſed of or intitled " to 200*l.* ſecured by an inſtrument in writing No. 28. upon the " tolls ariſing by or from the turnpike road between *Derby* in the " county of *Derby* and *Mansfield*; and whereas I am poſſeſſed of a " certain bond or obligation, bearing date the 21ſt day of *June* " 1771, whereby *William Chaworth*, heretofore of *Anneſley* aforeſaid, Eſq. deceaſed, became bound unto *Abel Smith* of *Nottingham* aforeſaid Eſq. in the penal ſum of 2000*l.*, conditioned " for the payment of 1000*l.* and intereſt upon the 21ſt day of " *December* then next enſuing, which bond was paid off by the " obligor's executor *William Chaworth* Eſq. my late father, deceaſed, who took an aſſignment thereof, which aſſignment is " dated the 21ſt day of *March* 1778; and whereas I am alſo poſſeſſed of a certain other bond or obligation, bearing date the " 5th day of *April* 1771, whereby the ſaid *William Chaworth*, " the obligor in the before-mentioned bond, became bound unto " *Elizabeth Lowe* of the town and county of *Nottingham*, widow, " in the penal ſum of 2,100*l.*, with a condition thereunder written " for payment of 1,050*l.* with intereſt for the ſame after the rate " of 4 *per cent.* on the 5th day of *October* next enſuing the day " of the date of the ſaid laſt-mentioned bond; which bond was " paid off to the executors of the ſaid *Elizabeth Lowe* by my ſaid " father, who took an aſſignment thereof, which aſſignment is " dated the 5th day of *April* 1779, to which ſums of money ſecured by the aforeſaid bonds I apprehend, that I as executor of " my ſaid late father am intitled; now I do hereby give and " bequeath unto my friend *Sarah Hawkſley*, who lives with me, " and is named in the aforeſaid will, the before-mentioned ſum " of 8000*l.* and alſo the aforeſaid ſum of 200*l.* and likewiſe the

CHAWORTH *v.* BEECH.

" ſaid two principal ſums of 1000*l.* and 1,050*l.* ſecured by the " aforeſaid bonds or obligations with the note, bonds and other " inſtruments, for ſecurity of the aforeſaid ſeveral ſums ſo by me " bequeathed to her; and I do hereby declare, I have given and " bequeathed the ſaid ſeveral ſums of 8000*l.* 200*l.* 1000*l.* and " 1,050*l.* to the ſaid *Sarah Hawkſley* abſolutely for her own uſe " and benefit, over and above the annuity and ſeveral legacies, " which I have bequeathed to her by my aforeſaid will, and alſo " over and above the bond in my ſaid will mentioned."

The teſtator died on the 9th of *July* 1791.

The banker's note mentioned in the codicil was dated the 9th of *June* 1791, and was expreſſed to bear intereſt at 3 *per cent.* from the 26th of *December* preceding for value received; and the teſtator made the following indorſement on it:

" 1791. *June* 13th. I give this note unto *Sarah Hawkſley* " which is along with me for the love and regard I have for her.

" Witneſs *John Burton*.

" GEORGE CHAWORTH."

The teſtator alſo made and ſigned indorſements of the ſame date upon the turnpike ſecurity and the bonds mentioned in the codicil: *viz.*

Upon the former,

" I give this unto *Sarah Hawkſley*."

And upon each of the bonds,

" I give unto *Sarah Hawkſley* this bond which my father paid " off."

The teſtator at the ſame time delivered the note, turnpike ſecurity, and bonds, to *Sarah Hawkſley*; who in 1792 filed a bill againſt the executors, and the bankers; praying, that an account might be taken of what was due to her in reſpect of the ſaid legacies and annuities; and that the defendants the bankers might pay the money due upon the note to her.

The executors by their anſwer ſtated, that they believed, the teſtator's aſſets were ſufficient to pay all his debts, funeral expences, and ſpecific legacies, but were not ſufficient to pay in full the other legacies.

By the decree made in that cauſe the 19th of *May* 1794, directions were given for taking the accounts; and that the defendants the bankers ſhould pay the ſaid ſum of 8000*l.* admitted to be due to the teſtator upon their note, into the bank to the credit of the cauſe, with the uſual direction for laying out the money; and that the Maſter ſhould compute intereſt upon the ſaid 8000*l.* according to the promiſory note; and that after deducting the coſts of the ſaid defendants what ſhould remain due ſhould be paid into the bank, &c. The money was paid in, and laid out accordingly; and produced 11,851*l.* 17*s.* 2*d.* 3 *per cent.* Bank Annuities.

The Maſter by his report charged the perſonal eſtate of the teſtator with a general pecuniary legacy to *Sarah Hawkſley* of 8000*l.*, with intereſt at the rate of 4 *per cent.* from a year after the death of the teſtator. It appeared by the report, that the aſſets, excluſive of the money produced by the note for 8000*l.*, were ſufficient for the debts.

The cauſe coming on for farther directions upon that report another decree was made on the 25th of *June* 1796, by which the funds produced by the promiſory note and the intereſt were directed to be carried over, and applied as part of the general perſonal eſtate of the teſtator.

Sarah Hawkſley after having filed the bill in that cauſe brought an action in the Court of *Common Pleas* againſt the bankers as indorſee of the promiſory note for 8000*l.* That action was tried before Lord *Loughborough*, who was of opinion, the indorſement was teſtamentary; and, a ſuit being then depending in the Eccleſiaſtical Court reſpecting the validity of the will and codicil, the plaintiff was nonſuited.

Mary Ann Chaworth, the reſiduary legatee of the teſtator, who was no party to the ſuit inſtituted upon the bill of *Sarah Hawkſley*, filed this bill in 1798, againſt the executors, and *John Beech* and *Sarah*, his wife, late *Sarah Hawkſley*, and the truſtees in their marriage ſettlement; ſtating, that the plaintiff was not a party to the ſuit inſtituted by *Sarah Hawkſley;* and that the proceedings in that cauſe are erroneous in having conſidered the legacy of 8000*l.* as pecuniary, and giving the directions accordingly; and that the ſame ought to be reviewed and reverſed; for that the ſaid legacy was ſpecific, and ought to have been decreed to be paid to the legatee with intereſt at 3 *per cent.*, according to the note; and that the Bank annuities purchaſed with the ſaid ſum of 8000*l.*, and the ſum of 844*l.* 13*s.* 7*d.*, alſo paid into court for intereſt due upon the ſaid note, ought not to have been decreed to be carried over and apportioned as part of the general perſonal eſtate, but ought to have been paid and transferred to *Sarah Hawkſley* in full ſatisfaction of the principal and intereſt due to her upon the ſaid promiſory note, ſo ſpecifically given to her.

The prayer of the bill was, that the decrees and proceedings in the ſaid cauſe may be reviewed and reverſed; that the legacy of 8000*l.* to *Sarah Hawkſley* may be declared ſpecific; and that proper directions may be given upon that ground; and that the plaintiff, the reſiduary legatee, may be put into the ſame ſituation, in which ſhe would have been, if the ſaid proceedings had not taken place.

The executors by their anſwer inſiſted, that even if the legacy of 8000*l.* was ſpecific, the application of it to the debts was proper; there not being ſufficient perſonal eſtate poſſeſſed by them to pay the debts; and that the defendants muſt be reimburſed out of the perſonal eſtate, after the debts are ſatisfied, when there is a fund in hand, and ſtand in the place of the creditors.

Mr. Lloyd and Mr. Daniel for the plaintiff—If this is not a ſpecific legacy, there never can be one, except of ſome ſpecific article, as a horſe, *&c.* This ſubject was very attentively conſidered by Lord *Thurlow* in *Aſhburner* v. *M'Guire* (*a*). The words in that caſe were not ſo ſtrong as theſe, in which this legacy is given. In *Stanley* v. *Potter*, another caſe before Lord 3
Thurlow, on the 16th of *July* 1789, *Edward Stanley* by his will, dated the 29th of *October* 1777, made the following diſpoſition. After reciting, that in 1772 he had lent *J. C.* 2000*l.*, and that for ſecuring the ſame *J. C.* had executed a heritable bond to him,

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(*a*) 2 *Bro. C.C.* 108.

he gave that his annual rent of 100*l.* or ſuch annual ſum for the time being as ſhould correſpond with the principle ſum of 2000*l.*, to the uſe of *Totham* and *Potter*, their executors, &c., for ninety-nine years, if his ſiſter ſhould ſo long live, upon truſt during the exiſtence of the term out of the annual rent and profits of the premiſes to pay to his ſiſter *Anne Stanley* or her appointee for life one annuity of 60*l.* by half-yearly payments. In 1786 the whole ſum of 2000*l.* was paid off; and all the ſecurities were given up. It was held by Lord *Thurlow* a ſpecific bequeſt out of a particular fund, liable to the diſadvantages, as it muſt have had the advantages, of a ſpecific legacy, and therefore, the rent failing by the receipt of the debt, the teſtator's ſiſter was not entitled to the annuity, but it was loſt. *Badrick* v. *Stevens* (*a*) and many other caſes are to the ſame effect; which are referred to in Mr. *Cox*'s note to *Hinton* v. *Pinke* (*b*) and *Rider* v. *Wager* (*c*).

This note was given to *Sarah Hawkſley* at the time of the indorſement, a fortnight before the date of the codicil; which was only for farther ſecurity, the gift being in the life of the teſtator. If the legacy is declared ſpecific, the conſequences will follow in the other cauſe upon the foot of that declaration. It was demanded by the bill in that cauſe as a ſpecific legacy; and therefore it is now hardly open to her to diſpute it.

Mr. Grant, *Mr. Richards*, *and Mr. Bell for the defendants Beech and his wife*—If, as it is ſaid, this legacy was demanded by the legatee as ſpecific, yet the Court decided againſt her as to that. This is a moſt direct legacy of money. It is a legacy of 8000*l.*, accompanied only with a deſcription of the fund, out of which the teſtator meant it to come, and which is ſufficient for it. It is nothing more than a demonſtrative legacy, according to the *Civilians*. He gives "*the before-mentioned ſum of* 8000*l.*" not "*the before-mentioned ſecurity*." The bequeſt is merely of a ſum of money, without any reference to the ſecurity. All, that relates to that, is preamble and introduction; ſhewing, that he has a fund ſufficient for the legacy, or, if you pleaſe, that that was the fund, out of which he wiſhed it to come. In all the caſes cited the legatory words are immediately connected with the ſecurity, and there was no bequeſt of the money unconnected with it: it was a bequeſt of the money ariſing from the ſecurity, not an

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(*a*) 3 *Bro. C. C.* 431. (*b*) 1 *P. Wms.* 540. (*c*) 2 *P. Wms.* 331.

abſolute bequeſt of a ſum of money. If in *Aſhburner* v. *M'Guire* the bond produced no intereſt, nothing was given; for there was no ſeparate ſpecific bequeſt of money, but only as ariſing out of that bond; and as to the principal, if there was no bond, there was no principal ſum given. Lord *Thurlow* admitted the diſtinction between a demonſtrative legacy and a *legatum nominis*; which he held the legacy in that caſe to be.

Stanley v. *Potter* is a caſe of the ſame ſort, or rather ſtronger. The teſtator recites a heritable ſecurity in the *Scotch* form; the nature of the ſecurity being to give an annual intereſt, to be taken out of the rents of the lands pledged, correſponding to the intereſt of the capital; and he gives all that his annual rent to the truſtees, upon truſt to pay the annuity to his ſiſter. If the truſtees had no annual rent, they had nothing to pay. Nothing therefore could be more ſpecific than that. *Badrick* v. *Stevens* was a good deal inſiſted on in the late caſe of *Roberts* v. *Pocock* (*a*); and is very diſtinct from this caſe, ſuppoſing it is not inconſiſtent with that. All the legacies in *Badrick* v. *Stevens* ſeem confined to the ſum due upon the bond. Even *Roberts* v. *Pocock* was a ſtronger caſe for holding the legacies ſpecific than this; for though the legacies were firſt given generally, they were afterwards confined to that debt due from Mr. *Davidſon*: in this caſe all, that relates to the ſpecific fund, is recital preceding the bequeſt; and there are no ſubſequent words to confine it. There is no caſe, in which introductory words have ever conſtituted a ſpecific legacy: otherwiſe there could be no ſuch thing as a demonſtrative legacy; for the demonſtration muſt be by ſome introduction of that ſort. *Pawlet's Caſe* (*b*), the leading caſe upon this ſubject, and cited in *Roberts* v. *Pocock*, ant. 150. tallies exactly with this. *Attorney General* v. *Parkin* (*c*), and *Coleman* v. *Coleman* (*d*) ſhew, that there is a great diſtinction between a ſpecific legacy, and a bequeſt of a ſum of money marked with reference to a ſpecific ſecurity: a diſtinction founded on good ſenſe. The fund ſo marked out is merely a ſecurity pointed out as the moſt efficient part of the property. Ademption applies more particularly to legacies of ſpecific things, as a horſe, or a manuſcript. *Saville* v. *Blacket* (*e*). *Rider* v. *Wager* (*f*), *Ford* v. *Fleming* (*g*), *Coleman* v. *Coleman*.

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(*a*) *Ante* 150. (*b*) Sir *T. Raym.* 335. (*c*) *Amb.* 565. (*d*) *Ante*, vol. 2. 639.
(*e*) 1 *P. Wms.* 777. (*f*) 2 *P. Wms.* 328. (*g*) 2 *P. Wms.* 469.

Upon theſe caſes this diſtinction is eſtabliſhed; that, where a ſum of money is bequeathed with reference to a particular fund, it is not a ſpecific legacy.

As to the indorſement, the conſtruction of the will cannot be varied by that. The plaintiff endeavoured to make uſe of that at law: but here ſhe ſues only upon the bequeſt.

But if this legacy is to be conſidered ſpecific, there is another point. The plaintiff wiſhes to conſider the legacy as inveſted and appropriated by being paid into the Bank and laid out in ſtock. Certainly there could be nothing improper in the Court's applying it to debts; but that cannot prejudice the defendant. It was paid in generally as part of the perſonal eſtate, without any reference to the legatee; and the ſtock purchaſed with it was afterwards treated as part of the perſonal eſtate, applicable to ſecuring the annuities. Clearly therefore there was no appropriation to this legacy. The only conſequence of holding it ſpecific will be a difference in the calculation of intereſt. Suppoſe, a horſe was ſpecificially given, and the executor having uſed the horſe for ten years was at the expiration of that time to offer him to the legatee!

Mr. Lloyd in reply—The teſtator giving the ſame thing by the codicil evidently did not conſider the previous gift good againſt himſelf. It alſo appears by the indorſement to be teſtamentary. If it had been a bond, it would have been a good *donatio mortis cauſâ*: but it has been determined, that there cannot be ſuch a delivery of a note (*a*). What can be a ſpecific legacy of a debt, if this is not? I do not know, that the opinion of Lord *Thurlow*, in *Aſhburner* v. *M'Guire*, who diſſented from Lord *Camden*'s opinion in *Attorney General* v. *Parkin* upon conſideration of all the caſes, has been ever contradicted. *Roberts* v. *Pocock* has made no alteration whatſoever in the ſubject. It was determined on the particular circumſtances, as the Lord Chancellor ſtates: the event upon the whole will, his Lordſhip thought, was not in the contemplation of the teſtator. The Lord Chancellor intimates, that his mind has fluctuated very much upon the point; and that

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(*a*) See *Miller* v. *Miller*, 3 *P. Wms.* 356, and the caſes referred to in Mr. *Cox*'s note, 357, and *Tate* v. *Hilbert*, *ante*, vol. 2. 111.

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it might be decided either way; but he relies upon the circumſtances; not meaning in the leaſt to contradict what was laid down by Lord *Thurlow;* which is, that where you find the teſtator intended the legatee ſhould have a particular debt, and gives that debt and the ſecurity for it, that ſhall be ſpecific; and no doubt, calling in that ſpecific bequeſt would be an ademption. That is only conſequential. Is it poſſible to ſay, this teſtator did not mean to give that identical note, and that only? Tranſpoſing 3 the words, it would be impoſſible to ſay, he meant any thing elſe. It muſt be read, as if he had ſaid, "I give the note for "ſecuring the ſum of 8000 *l.*" It would be very nice to hold, that if the inſtrument was given, that would make it ſpecific. Lord *Thurlow* diſſented from that diſtinction. It is in fact a gift of the debt and the ſecurity for it.

Maſter of the Rolls—Upon the ſecond point, there is no doubt. The defendant's legacy has been ſold; and ſhe is now deſired to take a depreciated ſecurity. It would be the groſſeſt injuſtice. The caſe, that has been put of the horſe, which after being worn out is offered to the legatee, is exactly in point. Suppoſe, the horſe had been ſold, and the money applied to the debts: the legatee muſt have been entitled to the value with intereſt from the moment that it was uſed for any other purpoſe. If this legacy is ſpecific, I muſt have ordered the money to be paid to her; and it muſt have carried all the arrears, all, that was due upon it. She ought not to have been turned round, as ſhe was: but the executors ought to have indorſed the note, and let her ſue upon it, if the fund was clear. If this note is the actual legacy, it is given with every thing due upon it. That is equally clear. As to the miſtake; ſhe would have been bound, if the ſtock had riſen. If it is ſaid, they were obliged to make uſe of the ſpecific legacy as general aſſets, the conſequence is, ſhe muſt be placed in the ſame ſituation as if ſhe had lent that ſum to the general aſſets. I have not the leaſt difficulty upon this part of the caſe.

The other point is very doubtful. I ſhould not diſmiſs this bill with coſts, nor prevent the executor from having coſts out of the reſidue. It was a miſtake in the Maſter's office.

April 23d.

Maſter of the Rolls—The object of this bill is to have a miſtake in the decree in another cauſe upon the bill of the defendant

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Mrs. *Beech*, claiming as a legatee under the will of *George Chaworth*, and to which bill this plaintiff was no party, ſet right; and the alleged error is, that a legacy demanded by her bill has been reported by the Maſter, and acted upon in the accounts in that cauſe, as a pecuniary legacy of 8000*l.* with intereſt at 4 *per cent.* according to the courſe of the Court from one year after the teſtator's deceaſe; whereas this bill alleges, that it was a ſpecific legacy ſecured by a note for 8000*l.* and intereſt. The bill, that was brought by the legatee, claimed this with ſeveral other ſecurities under the will of *Chaworth* as ſpecific legacies. By the anſwer of the executors they do not, as it was ſuppoſed, admit, that they had aſſets to entitle the legatee to have thoſe ſpecific ſecurities delivered up to her. They only ſay, they believe, the aſſets were ſufficient to pay the debts, funeral expences and ſpecific legacies, but not to pay in full the other legacies; but not admitting aſſets, an account was directed; and the Maſter has reported this legacy to be pecuniary. It ſeems, and I underſtand, that the other legacies were conſidered by him, and acted upon under the Report, as ſpecific (*a*). The conſequence of the Report, that this legacy was pecuniary, was, that the decree followed the Report; and the directions were given upon that footing. The money due upon the note was paid in, and laid out in ſtock under the decree; and that ſtands generally as money in the cauſe. It is farther ſought, I believe, by this bill, that the defendant ought not only to be declared entitled to this as a ſpecific legacy, but that ſhe muſt likewiſe take ſo much ſtock as was purchaſed by the money paid in; that it was an appropriation, by which ſhe muſt gain or loſe.

The great queſtion is, whether this is or is not a miſtake; being a ſpecific legacy, though reported to be pecuniary. It is not immaterial to ſtate (and it forms a very preciſe feature of the cauſe as to this queſtion) the tranſaction, that took place as to this note before the teſtator's death; which puts out of all doubt, what he really meant by this legacy. Some time, not long, before his death he took this note from the bankers at *Nottingham*, for 8000*l.* with intereſt at 3 *per cent.* payable one month after ſight; but the intereſt was to commence from a prior date. A few days afterwards he makes the indorſement upon the note, that he gives it to *Sarah Hawkſley*; and about a fortnight afterwards he made the codicil, upon which the point ariſes.

(*a*) This was agreed at the bar.

The queſtion firſt to be decided is, whether according to the rules, that have prevailed with regard to ſpecific and pecuniary legacies, this legacy is ſpecific, or not? I confeſs, I think, the Counſel for the plaintiff is right in ſaying, that if this is not ſpecific, there never can be a ſpecific legacy of any thing but a moveable chattel. In *Aſhburner* v. *M'Guire*, which is hardly ſo ſtrong as this, Lord *Thurlow* clearly decided the point. I admit, the bounds between ſpecific and pecuniary legacies are ſometimes very nice, and the arguments too refined: but we are now come to a clear underſtanding of the rule, upon which the Court proceeds; that the will is to be read with an inclination to hold it a general legacy, with reference only to the particular fund, as that, out of which it is in the firſt place to be paid. Before I come to conſider this caſe, I deſire to be underſtood not to deny, that a ſum of money may be given, and a reference made to a particular part of the eſtate, as that part, out of which the teſtator thinks it moſt convenient that it ſhould be paid. That was clearly admitted, and accurately ſtated, in the argument of the next cauſe(a), upon which I am to give judgment. There are ſuch caſes certainly; and the Court is ſo deſirous of conſtruing it a general legacy, that if there is the leaſt opening to imagine, the teſtator meant to give a ſum of money, and referred to a particular fund only as that, out of which in the firſt place he meant it to be paid, the legatee will have this advantage; that it ſhall be conſidered pecuniary, ſo as not to have the legacy defeated by the deſtruction of the ſecurity, if that ſhould be deſtroyed, and that he has a right to call for an appropriation.

Indorſement upon a note "I give this "note to *A.*" may be proved as teſtamentary.

Let us ſee, whether this can be conſidered as ſuch a legacy: *viz.* a legacy of 8000*l.* at all events, with a reference to the debt, not as the ſubject of the legacy, but merely as the moſt convenient fund to diſcharge it for the benefit of the legatee. The indorſement upon the note is ſufficient, I think, to have been proved as teſtamentary, if the teſtator had died without giving it by his will. If it had not been mentioned in the will, that indorſement, which was afterwards determined by Lord *Loughborough* in the action, that was brought, to be teſtamentary, might have been proved. Then, when we read that and the will, the latter is nothing more than a recognition of that teſtamentary indorſement made upon the note;

(a) *Innes* v. *Johnſon*. See the next caſe.

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note; and, with all the anxiety I feel not to hold a legacy ſpecific, unleſs it is demonſtrably ſo, it is impoſſible not to ſay, this teſtator meant to give the note itſelf with all the intereſt due upon it. If there had been no indorſement upon the note, even upon the will itſelf, and the caſe of *Aſhburner* v. *M'Guire*, which is the true rule upon this point, I muſt hold, that the legacy is that note, and nothing elſe.

I need not, except with reference to the next cauſe (*a*) to be decided, enter much into the queſtion in *Aſhburner* v. *M'Guire*: but that caſe was determined by Lord *Thurlow* upon very full conſideration. His Lordſhip took, I believe, two years before he gave judgment. He had conſiderable doubt upon it. It was preſſed upon him, that the opinion he finally adopted, would infringe upon the doctrine of Lord *Camden* in *The Attorney General* v. *Parkin*; and Lord *Thurlow* ſeems not entirely to agree with that doctrine: but, I think, this very clearly diſtinguiſhes thoſe caſes, and I ſee, in the late caſes of *Coleman* v. *Coleman* and *Roberts* v. *Pocock*, the Lord Chancellor conſiders Lord *Camden* to have proceeded upon this idea, which is ſuſtainable, that the teſtator did not mean any particular mortgages, bonds, and ſecurities, but any mortgages, bonds, and ſecurities, that he might happen to have. If ſo, that is ſufficient to ſuſtain *The Attorney General* v. *Parkin*, without holding, that *Aſhburner* v. *M'Guire* has overturned it; which Lord *Thurlow* did not mean to do, though he intimated his doubts. But *Aſhburner* v. *M'Guire* eſtabliſhed this; that, if the legacy is meant to conſiſt of the ſecurity, it is ſpecific; though the teſtator begins by giving the ſum due upon it. It would be time ill ſpent to go over the caſes commented on by Lord *Thurlow*; for I ſhould do it much leſs ably than he has done. I ſhall only obſerve, that he mentioned *Lord Caſtleton* v. *Lord Fanſhaw* (*b*); in which the legacy of a debt was held as much ſpecific as the deviſe of a farm. If that caſe is accurately ſtated, (and it is in a very good book, and alſo in *Precedents in Chancery*, but upon another point) it is an authority perfectly concluſive upon the ſubject, and fully ſufficient to warrant *Aſhburner* v. *M'Guire*; and upon a very attentive peruſal of that caſe I am of opinion, that it is put upon a ground, that cannot now be miſtaken; that ſuch a legacy, unleſs there is a ground for conſidering it a legacy of money, and that the

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(*a*) *Innes* v. *Johnſon*. (*b*) 1 *Eq. Ca. Ab.* 298.

ſecurity is referred to only as the moſt convenient mode of paying it out of the aſſets, it is as much ſpecific as a legacy of a horſe, a cow, or any moveable chattel whatſoever. Therefore, upon the authority of *Aſhburner* v. *M'Guire*, with all the inclination I feel to ſupport this as a pecuniary legacy, I am of opinion, it is nothing but a gift of this note.

As to the other point, this legatee, ſoon after the death of the teſtator, brought an action as indorſee of the note; which was tried before the preſent Lord Chancellor, then Lord Chief Juſtice, who thought the indorſement teſtamentary; and therefore no one could bring the action but the executor. She alſo filed a bill; and then it was overlooked; and this was thought a pecuniary legacy: but the conſequence has been, that her legacy was put out in the funds; and now it is ſaid, ſhe ought to take ſo much ſtock as was purchaſed. That would be the groſſeſt injuſtice to her. She had a right to the ſpecific legacy. If the aſſets did not want it, ſhe had a right to have it delivered up. She was not bound to lay it out in the funds: if ſhe had done ſo, ſhe would have a right to the riſe, and be liable to the fall. Inſtead of that, the executors inſiſting it ſhould not go out of Court, it was paid in and laid out in ſtock. It is no more than the caſe, that was put in the argument, of a legacy of a horſe, which the executor refuſed to let go, leaſt there ſhould be a deficiency of aſſets, and having uſed and worked the horſe a conſiderable time, afterwards offered to return him: the legatee then may inſiſt upon the value.

Declare, that the legacy of 8000*l.* ought to be deemed and taken as a ſpecific legacy; and that the defendants are entitled to the ſum due upon the note at the time it was paid into Court, with intereſt at 4 *per cent.* from that time; and all parties muſt have their coſts (*a*).

(*a*) See the next caſe, and *Kirby* v. *Potter*, poſt.

1799.

Rolls,
April 22, 23.

INNES *v.* JOHNSON.

Teſtator gave to his ſiſter the intereſt of 300*l.* upon bond for life, and after her deceaſe to her daughter the intereſt due upon the ſaid bond at her death, with the principal: the legacy is ſpecific; and there being among other bonds one of the exact amount, it was held to refer to that, though an inſolvent ſecurity; and the intereſt in arrear before the death of the teſtator.

The inclination of the Court is againſt ſpecific legacies. The conſtruction muſt be upon the face of the will, before the account of the effects is conſidered, to ſee, whether that affords a foundation.

Dividend received by an executor on account of a bond ſpecifically bequeathed, but retained by him, and another, to which he was beneficially entitled under the will, apportioned.

JOSEPH CAVE by his will, dated the 8th of *July* 1781, made the following diſpoſition:

" *Imprimis*, I give and bequeath to my beloved ſiſter *Chriſtian* " *Innes* the full intereſt of 300*l.* upon bond during the term of " her natural life; and after her deceaſe then I give and will to " her daughter, by name *Chriſtian Innes*, all the intereſt, that ſhall " be fairly and juſtly due upon the ſaid bond at the time of her " death, together with the principal to have and diſpoſe of at " her own diſcretion, but not before the age of twenty-one years " complete; and laſtly, I do hereby nominate and appoint my " dearly beloved wife *Suſannah* ſole and only executrix of this my " laſt will and teſtament, leaving and giving unto my ſaid dear " beloved wife *Suſannah* all my real and perſonal eſtate with as " full, ample, and abſolute, a right, claim, property, and intereſt, " in them as I myſelf had at any time before and at the time of " my death."

The teſtator died in *January* 1781; leaving perſonal eſtate to the amount of 1500*l.* after payment of his debts and funeral expences. He was in poſſeſſion of two bonds from *Alexander Innes* the elder, the huſband of *Chriſtian Innes* the elder, and *Alexander Innes* the younger, his ſon, to the teſtator; by the firſt of which, dated the 3d of *September* 1768, *Alexander Innes* the elder, and *Alexander Innes* the younger, in conſideration of the ſum of 300*l.* lent to them by the teſtator, jointly and ſeverally bound themſelves, their heirs, and executors, to repay the ſame with intereſt at the rate of 5 *per cent.* from the date of the bond; and in caſe of failure the obligors bound themſelves to pay to the teſtator, his heirs, executors and aſſigns, the ſum of 60*l.* *ſterling* penalty over and above the principal ſum of 300*l.* and the intereſt at the rate of 5 *per cent.*, &c.

By the other bond, dated the 16th of *February* 1769, *Alexander Innes* the elder and *Alexander Innes* the younger, in conſideration of the ſum of 200*l.* lent to them by the teſtator, jointly and ſeverally bound themſelves, their heirs and executors, for the repayment with intereſt at the rate of 5 *per cent.* from the 25th of *December* preceding; and in caſe of failure the obligors bound themſelves to pay to the teſtator, his heirs, executors, and aſſigns, the ſum of 40*l.* ſterling penalty over and above the principal ſum of 200*l.* and intereſt, &c.

The executrix cauſed the two bonds for 300*l.* and 200*l.* to be put in ſuit in the Court of Seſſion in *Scotland*, in *June* 1782 againſt *Alexander Innes* the elder, and in *June* 1783 againſt the repreſentatives of *Alexander Innes* the younger, who was dead. A decree for payment of theſe bonds was obtained: but all that was recovered was the ſum of 54*l.* 5*s.* received in 1786 from the truſtees for the creditors of *Alexander Innes* the younger in part diſcharge of the two bonds, and the intereſt. The coſts incurred amounting to 14*l.* 15*s.* left a balance of 39*l.* 10*s.* in the hands of the executrix on account of thoſe bonds.

The teſtator was alſo at the time of his death poſſeſſed of other bonds executed to him, *viz.* one from *Nicholas Nugent* for the ſum of 1500*l.*; another dated the 30th of *May* 1776, from *Sarah Plees* for 200*l.* and intereſt; and another, dated the 14th of *Auguſt* 1777, from *Sarah Plees* for 350*l.* The teſtator had before his death received 1100*l.* of the money due upon the bond from *Nugent*; and the remaining 400*l.* with the intereſt was afterwards received by his executrix. The money due on the two bonds from *Sarah Plees* was not received.

Alexander Innes the elder being alſo dead, the bill was filed by his widow and her daughter againſt the executrix of the teſtator and her ſecond huſband; praying, that the defendants might be decreed to pay the plaintiff *Chriſtian Innes* the elder, the intereſt of 300*l.* ſince it ought to have been paid, and to place out the principal for the benefit of the other plaintiff, according to the will.

The bill ſtated, that, as to the two bonds due to the teſtator from *Alexander Innes* the elder and *Alexander Innes* the younger, at the date of the will the obligors were inſolvent to the knowledge of the teſtator; and no intereſt had been paid upon them ſince the year 1776; and in 1778 the eſtates of the obligors were ſequeſtrated by the Court of Seſſion in *Scotland*.

The defendants by their anſwer ſtated, that the defendant *Suſannah Johnſon* being deſirous to ſecure to the plaintiffs the benefit intended them by the teſtator, and being apprehenſive, that they might loſe the ſame by reaſon of the death of *Alexander Innes* the younger in embarraſſed circumſtances at *Jamaica* about the year 1782, and by reaſon of the declining fortune of *Alexander Innes* the elder, (from neither of whom the defendant ever received any intereſt due upon the ſaid bonds,) unleſs recourſe ſhould be had to a Court of juſtice, had cauſed the ſaid two bonds to be put in ſuit: but ſhe was not able to enforce the decree againſt *Alexander Innes* the elder, owing to his reſiding during his life in ſome privileged place in *Edinburgh;* and all, that was recovered upon the ſaid two bonds, was the ſum of 54*l.* 5*s.* received from the truſtees for the creditors of *Alexander Innes* the younger, notwithſtanding every poſſible exertion. The defendant ſubmitted, that ſhe was at liberty to place the ſum of 39*l.* 10*s.*, the balance after deducting the coſts, to the account and in diſcharge of the ſaid bonds and the intereſt; being willing to aſſign over the ſaid bond for 300*l.* to the plaintiffs.

The defendant *Suſannah Johnſon* by her farther anſwer ſtated, that ſhe did not know, whether the obligors in the ſaid two bonds were at the date of the will inſolvent to the knowledge of the teſtator; or whether no intereſt had been paid upon them from the year mentioned in the bill, or whether the eſtates of the obligors were ſequeſtrated in the year mentioned in the bill; that ſhe never offered to deliver up the ſaid bonds to the plaintiffs, and never was applied to for that purpoſe: if ſhe had been, ſhe was ready to aſſign the bond for 300*l.* She never heard the teſtator ſay, that the *Inneſes* were inſolvent: but he has in her preſence expreſſed his ſurpriſe and diſpleaſure at the intereſt upon the ſaid two bonds not being regularly paid.

Mr. Graham and Mr. Alexander for the plaintiff—The claim made by this bill may be argued three ways: Firſt, that this is a legacy of money with reference to a particular fund, or a demonſtrative legacy: Secondly, that it is ſpecific, but not individual: that is, if you can find any ſum of 300*l.* due upon bond, it ſhall attach upon that: Thirdly, as it will be contended for the defendant, that it is an individual legacy due upon a particular bond. If that is ſo, it muſt be taken for better or worſe; and the plaintiffs muſt fail.

Upon the firſt and third points, a legacy is demonſtrative, where the ſum is mentioned; and the legacy ſhall not be loſt, though the fund fails. *Aſhburner* v. *M'Guire* (*a*) certainly raiſes ſome difficulty as to that. The inclination of the Court is againſt holding a legacy ſpecific; and unleſs there is ſomething in the will marking to demonſtration, that the legatee ſhall take the thing deſcribed ſpecifically and individually, the Court would rather conſider it ſimply as a legacy ſecured by a particular fund only, and not to follow the fate of that particular fund. Moſt of the caſes are referred to in *The Attorney General* v. *Parkin* (*b*), *Aſhburner* v. *M'Guire*, *Simmons* v. *Vallance* (*c*), and *Roberts* v. *Pocock* (*d*). The concluſion is, that this is no more than a demonſtrative legacy. *Pawlet's Caſe* (*e*) is preciſely the law upon the ſubject: but the old diſtinction, as to a legacy of a debt received by the teſtator, between a compulſory payment upon his calling for it and a voluntary payment, is now clearly exploded by Lord *Macclesfield* in *Lord Thomond* v. *Lord Suffolk* (*f*), Lord *Camden* in *The Attorney General* v. *Parkin*, and Lord *Thurlow* in *Aſhburner* v. *M'Guire* (*g*). The caſe of *The Attorney General* v. *Parkin* was very much ſtudied by Lord *Camden*; who evidently inclined againſt conſidering a legacy ſpecific, unleſs the Court is forced to that conſtruction. Lord *Camden* alſo thought himſelf enabled to ſay, that, where the ſum is mentioned, that is ſufficient to make the legacy demonſtrative: but Lord *Thurlow* certainly did not accede to that diſtinction, though he agreed in the other.

Upon the ſecond view of the caſe there is no difficulty, except from the word "*ſaid*." That word does not make it individual, according to the diſtinction taken by Lord *Hardwicke* in *Purſe* v. *Snaplin* (*h*). It does not neceſſarily indicate an intention in the teſtator to ſingle out any one bond, but may refer to ſuch as the executor may ſingle out as competent to the claim. When a ſufficient ſecurity by bond is found, capable of being appropriated, and the executor has ſingled out any one bond, that is good, that

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(*a*) 2 *Bro. C. C.* 108.

(*b*) *Amb.* 566.

(*c*) 4 *Bro. C. C.* 345.

(*d*) *Ante* 150. See alſo the caſes collected in Mr. *Cox's* note to *Hinton* v. *Pinke*, 1 *P. Wms.* 540. and Mr. *Sanders'* note to *Purſe* v. *Snaplin*, 1 *Atk.* 414. 3 *Woodes.* 531-535.

(*e*) Sir *T. Raym.* 335.

(*f*) 1 *P. Wms.* 461.

(*g*) See Mr. *Cox's* note, 1 *P. Wms.* 464. and *Coleman* v. *Coleman*, *ante*, vol. 2. 639.

(*h*) 1 *Atk.* 414.

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is the bond intended; and the meaning is, that whatever bond ſhall be appropriated to this legacy, and of which the teſtator's ſiſter ſhall have received the intereſt during her life, ſhall after her death ſecure the principal to his niece. It has no reference to any bond exiſting at the date of the will. In *Sleab* v. *Thorington* (*a*) the ſame word occurred, but had not the effect of making the legacy individual. The intention muſt be to give 300 *l.* ſecured upon a good bond: elſe it is not ſecured at all. The bond being for more than the preciſe ſum is of no conſequence. The Court cannot look to the circumſtance, that one of the four bonds due to the teſtator was for that exact ſum. In *Andrews* v. *Emmot* (*b*) it was held, that the Court cannot look to extrinſic circumſtances. This is not a latent ambiguity: if there is any, it ariſes upon the face of the will. In *Purſe* v. *Snaplin* the Court would not liſten to the argument, that the teſtator had that preciſe ſum ſtanding in his name; and it failed alſo in *Bronſdon* v. *Winter* (*c*). There is a very ſingular and anomalous caſe, *Fonnereau* v. *Poyntz* (*d*), in which Lord *Thurlow* admitted evidence of extrinſic circumſtances: but except that inſtance I know of no caſe, in which extrinſic circumſtances have been reſorted to in order to give a conſtruction to the will; and that would be a ſtrange ground of deciſion. Extrinſic circumſtances are to be looked to with a view to the manner, in which the property is to be diſpoſed of, but not with a view to the conſtruction of the will (*e*).

Suppoſe, this bond for 300 *l.* had not appeared, what muſt have been the conſtruction? The teſtator muſt have underſtood it to have been a mere ſhadow, and, conſidering the near degree of relation, in which the legatees ſtood to him, he could not have intended their legacies to depend on ſuch a ſecurity.

Mr. Lloyd for the defendants was ſtopped by the Court.

Maſter of the Rolls—I ſhall not call upon the Counſel for the defendants, unleſs I ſhould ſee more reaſon to doubt, than I do at preſent.

The plaintiffs may avail themſelves of the leaning of the Court againſt ſpecific legacies. I ſhall always lean againſt that conſtruction: but I muſt not permit that to prevail, if the legacy is

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(*a*) 2 *Veſ.* 560. (*b*) 2 *Bro. C. C.* 297. (*c*) *Amb.* 57. (*d*) 1 *Bro. C. C.* 472.
(*e*) See *Selwood* v. *Mildmay, ante*, vol. 3. 306.

clearly ſpecific. The expreſſion "*the ſaid bond*" ſhews, there was an individual bond in his contemplation. If he had ſaid "*due upon bond*," I ſhould perhaps have ſaid, he did not mean any particular bond. It will turn entirely upon this; whether that expreſſion "*the ſaid bond*" points to an individual bond; and then I muſt ſee, whether there is any particular bond, to which it may apply. The caſe of *Bronſdon* v. *Winter* is one of the very few decrees by Mr. *Verney*. I have a much more full note of that caſe by the late Mr. *Randle Ford*. The ſtate of the caſe in the printed Report is very nearly, but not quite, accurate.

If this legacy was ſpecific, I think, as I did in *Chaworth* v. *Beech* (*a*), that the executrix ſhould have put it into the hands of the legatee; who might perhaps have got it in. She ought to have had an option. Whereas you have mixed the money received on account of the two bonds. Is it meant, that the legatee ſhall have only her proportion of what has been recovered, or the whole? I rather think it fair, that whatever has been got in ſhould go ſo far towards the legacy.

April 23d.

Maſter of the Rolls—This is a cauſe of the ſame nature as that, in which I have juſt given judgment (*b*); and I am very ſorry to be under the neceſſity, after very full conſideration and a great anxiety to hold otherwiſe, of deciding, that this legacy is likewiſe ſpecific and not pecuniary. It turns out, that in fact there was among the aſſets one bond for the exact amount of the legacy: but there were alſo many other bonds belonging to the teſtator; and it was inſiſted, and very properly, that the Court is to determine upon the face of the will, whether the legacy is ſpecific or pecuniary, and not to travel into the account of the effects to ſee, whether that ſhall be turned into a ſpecific legacy, which upon the face of the will is to be taken as pecuniary. It was argued, I think, with great ſucceſs, that, if upon the face of the will the legacy is to be preſumed not to be ſpecific, I ought not to travel into the account of the effects to turn it into a ſpecific legacy. If it had reſted upon the firſt words "300*l.* *upon bond*," ſhould I aſk any other queſtion than this, whether the teſtator had more than one bond? If he had only one of that particular amount, that, I think, is not ſufficient, and would be too ſlight a ground: but

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(*a*) See the preceding caſe. (*b*) *Chaworth* v. *Beech*, the preceding caſe.

if he had only one bond in the world, I muſt have ſuppoſed he meant that: but that is put out of doubt by the ſubſequent words "*the ſaid bond.*" It was contended, that according to the rule of the Court, preſuming in favor of pecuniary legacies, the fair conſtruction is, that it was a ſum of 300*l.* ſecured by a bond, and the executrix was to ſingle out any bond. I will not ſay, that if there was one bond, and no other, there would not have been ſome ground for that argument: but is it poſſible upon the latter words to ſay, he meant the intereſt of 300*l.* ſecured by *a* bond, when he uſes the expreſſion, "*the ſaid bond?*" I took occaſion a few days ago (*a*) to obſerve, that in conſtruing a will I ſhould not go upon grounds of favor or diſfavor to the object of the teſtator, if I could diſcover his intention. Upon a conſideration of all the caſes I think myſelf bound to ſay, this teſtator had in view a particular bond. I am then obliged, if I ſee a ground for holding the legacy ſpecific, to ſee, whether the effects afford any foundation for it; and I ſee a bond for 300*l.* due to the teſtator. This is very like the caſe of *Aſhburner* v. *M'Guire*, in the circumſtance, that the bond was due from the huſband of the legatee. I am therefore obliged, very reluctantly, as this bond is an inſolvent ſecurity, to ſay, the legacy is ſpecific.

Favor or diſfavor to the intention is not a ground for conſtruing a will.

There is no occaſion for me to enter into the diſtinction as to the ademption of the legacy between a voluntary payment by the debtor and a payment by compulſion, the teſtator calling for it. If it was neceſſary, I ſhould agree with Lord *Thurlow*, that it makes no difference whatever. In *Coleman* v. *Coleman* (*b*) the *India* bill was a thing in a courſe of payment, that muſt come in at a regular time. The Lord Chancellor laid hold of that as one circumſtance to ſhew, the teſtator could not mean the legacy to be ſpecific. That might be the reaſon, why in *Bronſdon* v. *Winter* the Maſter of the Rolls held the bequeſt, not only of the *South-Sea* Stock, but of the Navy Bills, not to be ſpecific: but I have miſlaid the note of that caſe, to which I referred. It is, however very nearly correct, as it is printed.

The Maſter of the Rolls was of opinion, that upon the bequeſt of a debt there is no diſtinction between a voluntary and compulſory payment to the teſtator as to the queſtion of ademption.

The next queſtion ariſes upon the circumſtance, that there is another bond, for the ſum of 200*l.*, due from the ſame obligors, and the fact, that nothing was recovered but a very ſmall ſum

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(*a*) See the judgment upon the will of Mr. *Thelluſſon*, *ante* 329.

(*b*) *Ante*, vol. 2. 639.

upon theſe two bonds. It does not appear, that there was any negligence in the executrix. A ſmall dividend was received out of the effects of one or both the obligors in ſuits brought upon both the bonds. The queſtion is, whether that is to be apportioned between the two bonds, or whether the plaintiff is entitled to all, that has been received? It is a very ſmall ſum to be apportioned. I think, I do not go too far in applying all, that was recovered, in payment of the bond for 300*l.*, on account of its having remained in the hands of the executrix; who being a truſtee of that bond, and beneficially entitled to the bond for 200*l.* ought to have preferred that bond, as to which ſhe was truſtee; as ſhe has the conduct of the cauſe, and not the legatee. If the latter had been in poſſeſſion of the bond, ſhe might have got a priority.

Upon the ſecond queſtion, the Counſel for the defendants preſſing for the apportionment, the Maſter of the Rolls ſaid, if it was inſiſted on, he muſt apportion it; but, that he would give the coſts to the plaintiffs.

Accordingly it was directed, that the defendants ſhould pay three-fifths of the ſum of 39*l.* 10*s.*, together with the coſts, and aſſign over the bond for 300*l.*, to the plaintiffs, together with all dividends, that may hereafter accrue upon the ſaid ſum of 300*l.* in the ſuit in the Court of Seſſion in *Scotland*.

At length the defendants, upon the repeated recommendation of the Court, ſeemed inclined not to preſs the apportionment.

REED *v.* ADDINGTON.

April 24.

Teſtator gave to his wife the third part of all his property, that ſhould become due to him after his deceaſe: then after giving ſome legacies he gave all the reſidue of his eſtate in general words, ſubject to the payment of all his debts, funeral expences, and legacies, upon truſt to collect the ſame reſiduary eſtate and pay the ſame to certain perſons. The wife is entitled to a third of the perſonal eſtate, ſubject to the debts, but not to the legacies.

WILLIAM REED by his will, dated the 15th of *October* 1789, after giving directions reſpecting his funeral, made the following diſpoſition:

"I give and bequeath to *Amia Auguſta Reed*, my loving ſpouſe,
"the third part of all my property that ſhall become due to me
"after my deceaſe:

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The teſtator then, after giving ſeveral legacies and an annuity, proceeds thus:

"And as to all the reſt, reſidue, and remainder, of my eſtate "and effects whatſoever and whereſoever ſubject to the payment "of all my debts funeral expences and legacies I give and bequeath "the ſame and every part thereof unto *Joſeph Addington* and "*Ralph Johnſon* upon truſt that they and the ſurvivor of them do "and ſhall collect get in and receive the ſame reſiduary eſtate and "effects and place out and inveſt the produce thereof after pay-"ment and diſcharge of my debts legacies and funeral expences "in any of the public funds in their names and receive the "intereſt and dividends and pay and apply the ſame towards the "education and maintenance of *Anna Maria Turnbull James* "*Turnbull* and *Matilda Turnbull* the children of my lately de-"ceaſed foreman *William Turnbull* by *Hannah* his wife alſo de-"ceaſed until they ſhall attain the age of twenty-one:"

And when and as they ſhould attain reſpectively the ſaid age of twenty-one years, then upon truſt to pay, aſſign, and transfer the ſame reſiduary eſtate and effects, or the ſame, wherever the ſame may be placed or inveſted, and every part thereof, unto and between *Anna Maria Turnbull*, *James*, and *Matilda*, *Turnbull*, or the ſurvivor of them, in equal ſhares and proportions; and if but one of them ſhould live to attain the age of twenty-one years, then the whole thereof to that one.

Joſeph Addington and *Ralph Johnſon* were appointed executors. The teſtator died early in the year 1790.

The bill was filed by his widow; praying, that an account may be taken of his perſonal eſtate, debts, funeral expences, and legacies; and that the plaintiff may be decreed to be entitled to one clear third of the ſaid teſtator's perſonal eſtate, freed and diſcharged from the debts and funeral expences of the ſaid teſtator.

By the decree made by the Maſter of the Rolls on the 15th of *February* 1794 the accounts were directed.

By the Maſter's Report it appeared, that the perſonal eſtate of the teſtator received by the executors amounted to the ſum of

4,462*l.* 12*s.*, and the debts, funeral expences, and payments in the execution of the will, and the legacies, amounted to 826*l.* 12*s.* 9*d.* Several debts due to the teſtator in his trade of a taylor were ſtill outſtanding.

The cauſe came on for further directions; and the queſtion was, whether the plaintiff was entitled to a third of the clear perſonal eſtate of the teſtator at the time of his death, diſcharged from the debts, funeral expences and legacies?

Mr. Graham and Mr. Cooke for the plaintiff—Mr. Lloyd for the infant reſiduary legatees.

The Lord Chancellor was of opinion, that the fund diſpoſed of was the fund after payment of the debts; and decreed, that the plaintiff therefore muſt take a third of the perſonal eſtate after payment of the debts; but that the legacies were not charged upon that third, but were to come out of the reſidue; and by the decree it was ſo declared.

DE CARRIERE *v.* DE CALONNE (*a*).

April 28.

Writ of *Ne exeat regno*, obtained by one *French* emigrant againſt another, diſcharged upon the circumſtances appearing upon the affidavits in ſupport of the bill, and upon the anſwer; which may be read; the application not being in the nature of an affidavit to hold to bail, but to the diſcretion of the Court, applying a remedy, not in its origin diſtinctly applicable to private tranſactions between ſubject and ſubject. It is very delicate to apply it as againſt foreigners; and it would be a neceſſary term, that it ſhall be ſimply a caſe of Equity.

THIS bill was filed by *Charles Elien de Bourgevin de St. Morys De Carriere* againſt *L'Abbé Jaques Ladiſlas Joſeph De Calonne*, and —— *De Moligny*; praying, that the defendant, *L'Abbé De Calonne*, may be decreed to pay the plaintiff the ſum

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(*a*) The defendant, L'Abbé *De Calonne*, the brother of Monſieur *De Calonne*, formerly Miniſter of *France*, had taken refuge in this country in conſequence of the revolution in that Kingdom. The other parties were alſo *Frenchmen* reſiding here under the ſame circumſtances.

Early in the term L'Abbé *De Calonne* appearing in Court read a ſtatement of his caſe, and repreſented his incapacity from his ſituation of making a defence in the uſual manner.

The Lord Chancellor having heard the ſtatement with moſt humane attention deſired Mr. *Carr*, the acting Secretary for lunatics, to prepare the defence; and expreſſed a reliance on the bar; which was confirmed by the general intereſt excited. The *Attorney General* immediately propoſed, with the aſſiſtance of Mr. *Campbell*, to undertake the defendant's caſe.

of 500*l.*, with intereſt from the time the money was lent; and that the writ of *Ne exeat regno* may iſſue.

Under an order made upon motion before the Maſter of the Rolls, ſitting for the Lord Chancellor, the writ iſſued; and the defendant was arreſted.

On behalf of the defendant a motion was made to diſcharge the writ.

The circumſtances, as they appeared upon the affidavits of the plaintiff and the defendant *De Moligny* in ſupport of the bill, were theſe:

In *May* 1794 the plaintiff's father the Count *De Bourgevin Valeart de St. Morys*, formerly a Judge of the parliament of *Paris*, brother of the defendant *De Calonne*, lent the ſum of 500*l.* to the defendant *De Calonne*; who ſigned a note upon unſtamped paper to ſecure the repayment. The loan took place in this country; in which both parties had taken refuge in conſequence of the revolution in *France*. In *Auguſt* 1795 the plaintiff's father was Commiſſary general to the *French* army upon the expedition to *Quiberon*. He died in that year; having by his will, dated the 15th of *May* 1795, among other things declared his deſire, that *De Calonne* would pay to his (the teſtator's) children the intereſt of the ſaid 500*l.* ſo lent by him, the teſtator, to *De Calonne*, until he ſhould be able to pay his (the teſtator's) children ſuch ſum of 500*l.*; and he intreated *De Calonne* to attend to the execution of ſuch will in concert with the teſtator's brother *De Moligny*; and the teſtator declared, that he relied upon his (*De Calonne*'s) honor and generoſity in that reſpect; not doubting, but that his ſentiments, which, he declared, were perfectly well known to him (the teſtator), would ſuggeſt to him what was expedient to be done for the benefit of his nephew and niece and their children, and induce him to conſider as ſacred every thing, that might prove a reſource to them in the diſtreſs he (the teſtator) left them.

The affidavits farther ſtated, that all the teſtator's debts were paid (except thoſe due in *France*); and the ſum of 500*l.* ſtill remains due from the defendant *De Calonne* to the eſtate of the teſtator, or to the plaintiff, as legatee thereof. The plaintiff had been twice in *Germany* ſince the teſtator's death; from whence he is lately returned. During the time he was out of *England* the defendant *De Moligny* took a promiſory note of hand or ſecurity, dated at *London* the 15th of *July* 1798, under the hand of *De Calonne* in the following terms:

"I the underſigned renew to Mr. *De St. Morys* the note, which "I gave to Mr. *De St. Morys*, his father, at *London* the 10th day "of *June* 1795; by which I engaged to repay him within five "years from the date of that bill the ſum of 500*l. ſterling*, which "he lent me to purchaſe a ſhare in the proprietorſhip of *Le* "*Courier de l'Europe;* hereby declaring, that in caſe of my deceaſe "before the repayment of the ſaid ſum of 500*l.* the ſaid Mr. "*De St. Morys* ſhall remain proprietor of the ſaid ſhare in *Le* "*Courier de l'Europe.*"

The plaintiff upon his return to *England* received the ſaid note from *De Moligny;* but was not ſatisfied with it; and wholly diſſented from having any thing to do with *Le Courier de l'Europe.*

The plaintiff's affidavit then ſtated, that the deponent believes, and has no doubt, that the defendant *De Calonne* intends ſhortly to quit, and is preparing, and hath in contemplation, to quit the kingdom for ſome part of *America;* where the deponent underſtands and believes, the brother of the defendant, or the defendant himſelf, hath procured the grant of a conveyance to him or one of them, or they have, or one of them hath, purchaſed ſome land; and the deponent believes, that in caſe the defendant ſhall ſo quit this kingdom without paying or giving ſecurity for payment of the ſaid 5000*l.* with intereſt, the ſame will be wholly loſt.

The affidavit of the defendant *De Moligny* confirmed that of the plaintiff; and proved applications to the defendant *De Calonne.*

The defendant *De Calonne* by his anſwer ſtated, that in 1794 one half of the property in the paper, called *Le Courier de l'Europe* was to be ſold to Mr. *Meneval* for the ſum of 500*l.*, upon condition, that he ſhould be the editor thereof; upon which the plaintiff's father repreſented to the defendant *De Calonne*, who is the plaintiff's uncle, that it would be greatly imprudent in the

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defendant to give up the editorſhip of the ſaid paper, for which the defendant was paid 200*l.* a-year, when he could preſerve it by purchaſing one half of the ſaid property for 500*l.* The defendant anſwered, that he was not worth one farthing; which the plaintiff's father well knew; upon which the plaintiff's father adviſed him to borrow the 500*l.* The defendant anſwered, he would not borrow it; becauſe he was conſcious, he ſhould not be able to repay it: notwithſtanding which the plaintiff's father repeatedly inſiſted, that the defendant ought to borrow the ſame; and at laſt called upon him, and ſaid, he had 200*l.* in money; and, if the proprietor of one half of the paper would accept the 200*l.* and a bill of exchange for 300*l.* upon *Peterſburgh*, he ſhould be extremely happy in doing the defendant a ſervice: notwithſtanding which the defendant refuſed the offer; alleging, that he ſhould never be able to repay ſuch a ſum; and that the plaintiff's father was not able to make a preſent of it; as he had a family; to which the plaintiff's father replied, that he had a property of near 7000*l.* in *Ruſſia*; which would be more than ſufficient to live upon until his and the defendant's return to *France;* and that the defendant ſhould pay the 500*l.* only in *France*, and at the end of one year after the return of the defendant to *France;* and, in order to make the defendant more eaſy, the plaintiff's father, at the time of advancing the money, required no ſecurity for it or acknowledgment from the defendant of his having received that ſum until twelve or fifteen months afterwards; when the plaintiff's father, previouſly to his ſetting out upon the *Quiberon* expedition, requeſted the defendant to give him ſome acknowledgment, that he had lent the defendant ſuch ſum of money; alleging as a reaſon for requiring it, that the plaintiff had reproached him for having lent the defendant ſuch a ſum of money without taking any proof of the loan. Upon this application the defendant reminded the plaintiff's father, that the condition of the loan was, that it ſhould be repaid in *France* only; and that therefore no acknowledgment ought to be given by the defendant, which could in any degree make the defendant reſponſible in *England;* and that the plaintiff's father well knew, it was impoſſible for the defendant to repay the ſaid ſum or any part thereof in *England;* to which repreſentation the plaintiff's father aſſented; and being, as the defendant verily believes, firmly perſuaded, that both the defendant and himſelf would be reſtored to their country within twelve months, he propoſed to the defendant to give him a promiſory

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miſſory note for 500*l.* payable five years after the date, in order to give the defendant ample time after his return to arrange his affairs, before he could be called upon to diſcharge the ſaid ſum; to which propoſal the defendant aſſented, in confidence that the plaintiff's father would never attempt to call upon him for payment in *England*, even if the event of their return to *France* (which at that time they both thought very probable) ſhould not take place; and therefore the defendant gave plaintiff's father an acknowledgment in writing upon plain paper in the *French* language; of which the following is a tranſlation:

> " I the underſigned acknowledge to owe Monſ^{r} *De St. Morys*
> " the ſum of 500*l.* *Sterling* for money, which was lent me; and
> " which I promiſe to pay him within five years from the date
> " hereof; or ſooner, if in my power.
>
> " L'Abbé De Calonne."
>
> " Dated, *London* 10th *June* 1795."

At the ſame time the plaintiff's father, who was then about to embark upon the *Quiberon* expedition, declared to the defendant, that he had already taken the neceſſary precaution in his will, that in caſe of his death the plaintiff, his ſon, would never be able to diſtreſs the defendant; inaſmuch as he had by his will conſtituted the ſum into a perpetual annuity (and defendant ſays, that by the laws of *France* the capital of ſuch annuity is payable only at the option of the borrower). The plaintiff never demanded the principal, except by the bill, and except, that in the beginning of *January* the plaintiff and his uncle, the defendant *De Moligny*, propoſed, that the defendant's brother Mr. *De Calonne* ſhould engage to repay the ſaid ſum in a courſe of years, or ſecure to him ſome lands in *Prince Edward's Iſland* (a); and ſo far from demanding payment the plaintiff by the means of the defendant *De Moligny* requeſted the defendant *De Calonne* in *July* laſt to renew his note of hand, in order to have the clauſe inſerted in it, that in caſe of the defendant's death the property of *Le Courier de l'Europe* ſhould belong to the plaintiff; and thereupon the note in the bill mentioned was given; the form of which note was produced to this defendant by the other defendant; who informed him, that the reaſon for requiring him to renew his note of hand was in order

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(a) An iſland on the coaſt of *North America*, the propoſed ſituation of a colony under the direction of l'Abbé *De Calonne*.

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to have the clauſe reſpecting his intereſt in the paper, called *Le Courier de l'Europe*, inſerted therein; and the defendant *De Moligny*, when he preſented to this defendant the ſtampt paper to write the ſaid note upon, informed him, that ſuch ſtamp was neceſſary, in order to render the ſaid clauſe valid and legal; and that he received ſuch ſtamp from the plaintiff's wife for that purpoſe. In *January* laſt defendant offered the plaintiff all, that he was poſſeſſed of: namely his property in the ſaid paper, purchaſed with the ſaid 500 *l.*; and the plaintiff took the deed, which aſſigned the property therein to the defendant; and kept it from that time; and did not return it until the very moment, in which the defendant was arreſted.

The defendant admits, that the teſtator died at the time in the bill mentioned; having made his will in the *French* language, in his own hand writing of ſuch date, as in the bill is mentioned, containing the following clauſe:

" *Je deſire que l'Abbé* De Calonne *faſſe a mes enfans la rente*
" *de* 500*l. que je lui a preta.*"

The true and proper tranſlation of which words is not, as ſtated in the bill, but as follows:

" I deſire that the Abbé *De Calonne* would conſtitute to my
" children an annuity for the 500*l.*, which I have lent him."

And which clauſe, as ſo tranſlated, decidedly proves, that the teſtator did not conſider the defendant as liable to pay the ſaid ſum of 500 *l.* in the manner and under the circumſtances, as it is now demanded; but that he meant to exempt the defendant from paying the capital, if he ſhould be unable ſo to do, and to conſtitute a perpetual annuity according to the laws of *France*; in which country alone, and according to the laws of which country, the plaintiff's father intended that the defendant ſhould be anſwerable; and the defendant refers to the will; the whole of which will from the clauſe contained in it referred to *France*, and, the defendant ſubmits, could be executed only in *France*.

The defendant believes, the plaintiff was not in *England*, when the note in the bill mentioned was given to *De Moligny*; but that it

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it was demanded and accepted by him by the direction of the plaintiff; who, as the defendant is informed and believes, in a letter to his wife required her to demand a freſh note of hand from the defendant; in which the defendant ſhould declare, that the 500*l.* had been lent for the purpoſe of purchaſing *Le Courier de l'Europe;* and the defendant believes, the ſtamped paper, upon which the note was written, was given to the other defendant by the wife of the plaintiff. In *January* laſt the plaintiff well knew the defendant's intention to leave this country for the purpoſe of eſtabliſhing a Colony in *Prince Edward's Iſland;* and the plaintiff and his wife ſignified a deſire of accompanying the defendant; whoſe preſence was conſidered as neceſſary to render the eſtabliſhment of the Colony ſucceſsful; and upon the ſucceſs of which alone are founded all hopes of maintaining and providing for the defendant and his relations; who were plundered of all their property by the revolutionary government in *France.* The defendant has no property whatſoever, or any thing to ſubſiſt upon, except the ſum of 4*l.* 10*s. per* month; for which he is indebted to the generoſity of the *Engliſh* government, (being the allowance granted to ſuch of the emigrants, who were members of the Parliaments of *France*); and alſo except his ſhare in the paper, called *Le Courier de l'Europe;* which he is ready and willing to aſſign to the plaintiff, as a ſecurity for the 500*l.* advanced to the defendant by the plaintiff's father.

The defendant ſubmits, that, inaſmuch as the ſaid ſum of 500*l.* is by the expreſs ſtipulations between the parties at the time of the loan to be repaid to the plaintiff's father, and was demandable by him, in *France* only, in the event of the defendant's return to *France*, and to the recovery and payment of which in *France* both the plaintiff's father and the defendant at that time looked, and which place of payment and time of recovery of the ſaid debt the defendant did not mean to relinquiſh at the time he gave the ſaid note or undertaking to the plaintiff's father (which the plaintiff's father well knew), or at the time he gave the ſaid laſt mentioned note or undertaking, originally given and renewed by the defendant, the ſaid ſum is not payable until the 10th day of *June* 1800, and the defendant ought not to be prohibited by his Majeſty's writ of *Ne exeat regno* from leaving this kingdom.

It appeared that the note given in *July* 1798 was not upon the proper ſtamp. The affidavits for the plaintiff ſuggeſted, that the original note was deſtroyed: but it was produced in court by the defendant cancelled; the name being torn off.

The plaintiff was the only child of the teſtator; and reſided in *England* a great part of the time ſince the death of his father. In anſwer to a queſtion from the Court it appeared, that he returned from *Germany* to *England* in *December* 1798. *De Moligny* alone proved the will.

Mr. Grant for the plaintiff objected, that the anſwer could not be read; the application being in the nature of an affidavit to hold to bail.

The Lord Chancellor overruled the objection; ſaying, it was very different from an application to hold to bail; upon which the Court requires, not a ſtatement of a caſe, but a poſitive affidavit of a debt; and if the affidavit is not poſitive, the defendant cannot be held to bail.

Attorney General and Mr. Campbell in ſupport of the motion—If the note is void, yet, the intention of the tranſaction being, that it ſhould not be payable until a future time, there is no ground for granting the writ; but the only right of the plaintiff is to be placed in the ſituation, in which he would have been, if the proper ſtamp had been uſed. If that is done, he will not be entitled to the writ; which ought not to have been granted, if the defendant was willing to give the ſame engagement upon ſtamped paper.

The executor has made an affidavit in ſupport of the bill; which is ſingular; for there is no ground for a creditor or legatee to come for the writ, unleſs the executor is in colluſion, and will not act. The executor ſupporting the caſe by his affidavit makes it *felo de ſe*; for if he can ſue at law, the juriſdiction ſhall not be thus transferred from the law to this Court.

The caſe may be reſted here. The writ of *Ne exeat regno* requires as poſitive an affidavit as to hold to bail. I remember a caſe before Lord *Thurlow* of a bond payable at a day, that was paſt. The creditor prolonged the time by taking another bond, making the money payable at a future day. The obligor avowed, that he meant to leave the country before the day. Lord *Thurlow* wiſhed to grant the writ; but could not. It was a legal ſecurity; and the money was not then due.

What is there in theſe affidavits to ſatisfy the Court, that this debt is due now? They prove, that according to the original agreement a note was intended to be given to make the money payable at the end of five years. If the note is out of the caſe, the parol contract is, that it is payable in the year 1800. The action muſt be upon that contract, if the note is out of the caſe. That contract is actually reduced to writing. All the juſtice of the caſe in the moſt liberal ſenſe is, that this invalid written contract ſhall be made valid by a proper ſtamp, or that a new contract ſhall be executed with the proper ſtamp. The dying declarations of the creditor, who put this gentleman in a ſituation of great confidence, muſt alſo be attended to; and the circumſtances of the country, common to them both, and which they hoped would again be ſo. In the will it is diſtinctly pointed out, that the debtor ſhall pay the money, when he ſhall be able. The Court never granted this writ between two gentlemen under ſuch circumſtances, driven by the ſtate of things in their own country to a temporary reſidence in this; from which they may be removed in a moment The are not domiciled here. *Atkinſon* v. *Leonard* (*a*) was thought a hard caſe even between ſubjects of his Majeſty; and it is diſtinctly ſtated, that Lord *Northington* thought, this proceſs ought not to be granted between foreigners. In what way is this ſecurity to be framed? It muſt be very ſpecial; for your Lordſhip cannot avoid attending to the circumſtance, that the defendant may be ordered out of the kingdom at a moment's notice. How can he expect to get ſecurity; his ſituation not depending on himſelf? Conſider alſo the circumſtances of this loan. It was repeatedly refuſed: but the defendant at length yielded to the intreaties of the plaintiff's father. He demanded no ſecurity, until he was ſetting out upon the expedition to *Quiberon*; when he required an acknowledgment; ſuggeſting as the reaſon the reproaches of his ſon. The engagement was to pay the money within five years from the date, or ſooner, if in his power; and the creditor ſaid, in order that his ſon might not diſtreſs the defendant, he had by his will conſtituted the debt

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(*a*) 3 *Bro. C. C.* 218.

a perpetual annuity; in conſequence of which by the laws of *France* the capital is payable only at the option of the debtor. As to the difference ſtated upon the terms of the will, we have got the certificate of *French* lawyers upon the effect of that clauſe. Conſider alſo the conduct of the plaintiff. The defendant agreed, that after his death his property in the paper ſhould belong to the plaintiff; and actually delivered to him the deed of aſſignment; which was kept by the plaintiff, and not returned until the moment of the arreſt. The plaintiff in *January* laſt knew the defendant's purpoſe of going to eſtabliſh a colony. Even upon the affidavits in ſupport of the writ it has improvidently iſſued. Conſidering this as a legal demand, it is impoſſible, that the writ can iſſue; and the propoſition, that it can be granted, when the debt is not payable, is monſtrous. The object of the defendant in quitting the country is not to evade the payment, which is the foundation of the writ, but merely to obtain thoſe funds, which may enable him in future to pay it. What is the equity of the plaintiff, deſerting his legal remedy? It is of great importance to the emigrants, that this paper ſhall be well carried on. The teſtator feeling the conſequence, that the defendant ſhould remain editor, forces this money upon him. Both look to *France*, as the place, where the money was to be repaid; which is evident from the clauſe in the will converting the debt into a perpetual annuity, and the other circumſtances; and the defendant communicated his intention of quitting the country and his object in ſo doing to the plaintiff laſt *January*. As to the circumſtances this caſe does not differ from *Talleyrand* v. *Boulanger* (*a*); in which caſe the contract being upon the laws of *France*, which did not warrant the proceeding, your Lordſhip ſtopped it. Suppoſe, the teſtator was alive, and had commenced an action, an injunction muſt have been granted.

Mr. Grant, Mr. Johnſon, and Mr. Wathen for the plaintiff.— The doubt ſuggeſted, whether this Court ought to interfere between ſuch perſons, will apply equally to any juriſdiction in any of the courts of juſtice upon civil ſuits between ſuch perſons. This is not, as in *Talleyrand* v. *Boulanger*, a debt contracted in *France*. The tranſaction took place in this country. It is ſingular, if they looked to *France* as the particular place for repayment, that the defendant having twice had an opportunity of expreſſing it

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(*a*) *Ante*, vol. 3. 447.

has not referred to that particular place. The object was, not the property of the paper, which was of little value, but to ſecure a valuable employment, *viz.* 200*l. per annum*; which the defendant got by the editorſhip. To lay a foundation for this writ it is not neceſſary to ſtate in the affidavit, that the defendant leaves the country in order to evade payment of the debt: it is ſufficient to ſtate, that he intends to leave the country, and that the conſequence will be, that the debt will be loſt.

It is ſaid, there is no remedy in this court; but the executor ought to ſue. The executor could maintain no ſuit at law: firſt, becauſe the defendant *De Calonne* is co-executor; and may prove the will; though he has not yet: ſecondly, becauſe there is no legal inſtrument, which can be produced at law. It is ſaid to be a ſufficient anſwer to this application, that the defendant is willing to give all, that in equity ought to be required, *viz.* a legal inſtrument: but there is nothing in this caſe at preſent but a loan of money. A condition is implied, that the inſtrument is a valid inſtrument; upon which the creditor can proceed, when it becomes due. There is no ſuch inſtrument. As to the capacity of the plaintiff, as being only a legatee, a creditor cannot ſue in his own name (*a*): but a ſpecific legatee of a debt may come here for the purpoſe of having his legacy ſecured, and may ſue both the executor and the debtor. In a late caſe at the Rolls a ſpecific legatee of a note filed a bill againſt the debtor in the note and the executor: and it was ordered to be paid into court, and ſecured. There is no allegation in this caſe, that the money is wanted to pay debts; and therefore there is the leſs reaſon that the ſuit ſhould be brought by the executor himſelf.

The conſtruction attempted to be put upon the will is completely founded in miſtake; which will appear, if the whole clauſe is attended to. If it ſtood merely upon the introductory words, the expreſſion is applicable to the dividends upon the public funds, and may be applicable to an annuity. But the following words put it out of doubt. If the purpoſe was to create an annuity, the intereſt of the money was not a fair payment with reference to ſuch a capital. All, that was meant, therefore was, that the defendant ſhould pay the intereſt, until he ſhould be able to pay the

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(*a*) *Utterſon* v. *Mair*, *ante*, vol. 2. 95.

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the principal. That is according to the official tranſlation of the probate; to which only the Court can attend. It is clear, the teſtator did not mean to releaſe or relinquiſh the debt. The defendant is not ready to fulfil the will, even according to his own conſtruction, by ſecuring the intereſt. By leaving the country he is about to extinguiſh every chance of payment. He exerciſes an election. He has an annuity of 200*l.* as editor of this paper; and he has objects of ſuch importance in this new adventure, that he thinks it for his benefit to give up that advantageous ſituation. Is it too much to expect, that out of theſe reſources he ſhould make ſome ſort of proviſion for this creditor? He contends that the plaintiff, becauſe his father was willing to take payment at a future time, ſhall not ſue now; though this is the only time at which he can ſue. To ſatisfy an exiſting demand the debtor offers a piece of paper; which can have no effect until long after his departure. Your Lordſhip muſt either refuſe this application upon the ground, that the plaintiff has a preſent legal demand, or hold, that he has a preſent equitable demand. As to the objection from the character of the defendant as a foreigner, where a defendant, a foreigner, has given bail, and is ſent out of the kingdom, the the bail are always relieved by order of the Court. Your Lordſhip has the ſame power.

Attorney General in reply—As to the conſequence of the defendant's departure from this country, your Lordſhip will not act upon the ſuggeſtion of what is poſſible in fact, though morally ſpeaking, highly improbable, when that ſuggeſtion contradicts the whole tenor of the defendant's conduct. No man ever gave a more honourable account; and his ſtatement of the original tranſaction is confirmed by the production of the cancelled note, and by the evidence of the other executor; who certainly is not adverſe to the plaintiff. There is no doubt therefore, that note was taken by teſtator, and contained the terms of the contract.

No authorities have been produced of granting this writ as between foreigners reſiding in this country for a temporary purpoſe; and Lord *Northington*'s opinion was againſt ſuch an extenſion of it. As to the caſe of bail, where there is a contract, of which the plaintiff finding himſelf in this country may avail himſelf, the law muſt act upon that: but is it ſo with regard to this writ; originally a high State prerogative writ, to prevent his Majeſty's own ſubjects from going into foreign countries to the detriment of the ſtate, founded on his Majeſty's right to hold any man in the country, whoſe preſence in the country was neceſſary for State purpoſes? The writ is ſometimes applied to civil rights: but is your Lordſhip to apply it under theſe circumſtances to perſons, who could have no conſideration of this remedy? All theſe gentlemen are involved in the conſequences of the ſevereſt calamity, that ever the providence of God inflicted upon mankind. Under no other circumſtances could this prerogative writ be applied with more injuſtice to the caſe of foreigners ſuing each other; the defendant without means of ſubſiſtence, except, as he ſtates, what he derives from the generoſity of this country, warding off a demand, which ought not to be yet enforced: the debt contracted upon the preſſing requeſt of the creditor, upon the moſt honorable ſenſations; the offer refuſed to the utmoſt, and accepted originally upon terms much more beneficial to the debtor than thoſe expreſſed in the note; the time being indefinite upon the firſt contract; and the definite period in the ſecond, attending to the hopes and expectations of the parties, proves, it had a reference to *France*. Your Lordſhip is required for the firſt time to extend this prerogative writ to diſable this defendant from ever obtaining the means of diſcharging this debt, and to continue him in the diſtreſs, in which he is involved, becauſe the plaintiff ſpeculates, that, if he is permitted to go and acquire the means of paying it, he will depart from the honorable conduct he has hitherto preſerved. The circumſtance of arreſting the defendant was harſh; the plaintiff having the aſſignment in his poſſeſſion ever ſince *January*, and not returning it until the moment of the arreſt. Upon the acceptance of that aſſignment I am entitled to ſay, the defendant's account of the original tranſaction is perfectly accurate. Look to the will of the teſtator. The defendant has a right to all the terms impoſed by the will with regard to this ſum of 500*l.* The writ unqueſtionably, if it ought to iſſue, could be marked with nothing but the intereſt due.

Lord Chancellor.—Suppoſe, the time of payment was paſt, and the executor upon the *mutuatus* had got a judgment for 500*l.*; and a bill was filed in this court ſetting forth the will, even with the tranſlation in the probate: ſhould I not grant an injunction?

Does not the defendant claim under the will as well as the ſon. The ſon muſt take the benefit, as it is given. The direction of the will according to the tranſlation of the probate is to pay the intereſt, until he is able to pay the principal. A ſpecific legacy is given to the ſon with an expreſs qualification.

Plaintiff at law has a right to hold the defendant to bail upon his own affidavit: but there have been caſes, in which the court of law has permitted an explanation of the circumſtances by the affidavit of the defendant, particularly between foreigners and upon foreign tranſactions; and, where an abuſe of the proceſs appeared, has directed common bail to be filed.

The application for the writ of *Ne exeat regno* ſtands upon a ground perfectly different from an affidavit in a court of law to hold to bail (*a*). That is a proceſs the party has a right to take upon his own affidavit without any application to the Court. Where it is a queſtion, as it often has been a queſtion, how far the the affidavit could be examined by the Court, if it is ſimply an affidavit to the debt, and there are no circumſtances, the Court is under great difficulty, and would create great embarraſſment, if they were to hear circumſtances to diſcharge the bail; though unqueſtionably there have been caſes, where upon the explanation of the circumſtances by an affidavit by the defendant the Court has ſo acted, and upon the circumſtances has diſcharged the bail; that is, has directed common bail to be filed. I know, this has been done in practice; particularly between foreigners and upon foreign tranſactions; becauſe the facility of arreſting in *England* holds out the opportunity of an abuſe of the proceſs of the Court, liable in itſelf to abuſe. There have been more caſes than one of this nature: but one particularly I remember between *Frenchmen*, both parties reſident generally at *Dunkirk*, but having each of them many tranſactions in *England*. One of them coming over to this country, the other ſtepped over, made an affidavit of debt, and then went back to *Dunkirk*. Upon an application to the Court the circumſtances of the caſe turned out to be theſe: There had been between the plaintiff and defendant a ſuit at *Dunkirk*. In the courſe of that ſuit the plaintiff in this kingdom had received judgment againſt him. From that judgment he appealed to the ſuperior tribunal; and pending that appeal inſtituted by himſelf againſt the judgment of the Court, which determined, that there was no debt due to him, he thought proper to avail himſelf of the proceſs of this country to arreſt the other party. It may be eaſily ſuppoſed, the defendant was diſcharged upon common bail.

But, whatever is the caſe of proceedings at law, an application for the writ of *Ne exeat regno* is to the diſcretionary power of this

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(*a*) See *Ruſſell* v. *Aſhy*, poſt.

Court, acting beyond the limits of the common law, and applying a remedy certainly in it's origin not diſtinctly applicable to private tranſactions between ſubject and ſubject. It is very delicate to interfere as againſt foreigners, whoſe occaſions or misfortunes have brought them here, by an application of this writ to them. It would be a neceſſary term, that it ſhall be ſimply a caſe of equity, affording no ground to ſue at law. If it is a ſimple and clear, definite, demand in equity, there is ſeldom much opportunity given for explanation of the caſe upon the part of the defendant: but if it is complicated, if from the ſtatement of circumſtances the general reſult is, that an equity ariſes, the obvious juſtice is, that the other party ſhould have an opportunity of ſtating the circumſtances, that may be ſo combined as to produce an equity; though it does not obviouſly ariſe.

Upon this application, firſt, the plaintiff comes here under the moſt unfavourable circumſtances, that it is almoſt poſſible for a party to bring forward in a court of juſtice. It is clear in the proceedings, he is creditor by founding himſelf upon the will. He is acting in direct contradiction to the whole tenor and purport of the will, in which there is any mention of the defendant, or any reference to the tranſaction with him. The repreſentation of his caſe covers the circumſtances by the manner, in which it is ſtated upon his affidavit. If it ſtood upon the original engagement, of which there is the fulleſt evidence, the recital of that engagement in the note laſt taken, upon the 15th of *July* 1798, it is perfectly clear, the loan was a loan, that was not to be repaid before the next year. I conceive, it is very clear, the Court will not interfere to grant the writ of *ne exeat Regno*, where there is no debt demandable from the party. The original terms of the loan are farther eſtabliſhed by the reference to it in the will.

Then if it ſtands upon this ſecond agreement, the application to the defendant was made by the co executor, ſtanding in the ſame degree of relation to the parties that he did. The purport is a renewal of the former note. It recites the loan made for the purpoſe of the acquiſition of the ſhare in *Le Courier de l'Europe*; adding this to it, a ſpecies of engagement to aſſign the ſhare of that property as a ſecurity in caſe of the death of the defendant before the period, at which the note might become payable. The plaintiff ſays, it was done without his direction; that he was abſent at the time. When the other affidavit is compared with his, it appears to have been done as a family tranſaction. The note was given in the preſence of the plaintiff's wife. The ſtamp was produced by the wife. The note was taken by the other executor. The plaintiff arrived in this country again in *December*. In *January* he took the aſſignment of the ſhare in *Le Courier de l'Europe*; and he kept it, until he thought fit to proceed in this buſineſs. The object of giving this note was to give hold over this property; which the defendant ſwears is all the property he is poſſeſſed of, being for his ſubſiſtence indebted to the charity of this government. It was not a ſecurity put into his hands by the other party, but, which his uncle, the other executor, took; and he confirmed it by the fact of his taking poſſeſſion of that aſſignment.

I could not poſſibly, if I was to act at all, permit the writ to be indorſed for the ſum of 5000*l*. The engagement, under which the defendant is come, and the title of the plaintiff under the will, plainly ſhew, a delay of payment was to be given to the time ſpecified in the note; *viz. June* next year. Suppoſe this agreement to be the ſubject of a ſuit at law: the debt is not the demand. The intereſt in arrear would be the only demand at this time in any court. But under the circumſtances I think, it would be a miſapplication of the writ of *ne exeat Regno* to grant it to this plaintiff againſt the defendant.

It is not an inconſiderable ingredient in the caſe, that either of theſe parties may be immediately removed from this country by the order of government; and I am not quite ſure, that upon the tranſaction, and the proceeding, this plaintiff has thought proper to take, it would be quite improper to conſider, whether that gentleman ſhould remain in this country.

Diſcharge the order.

April 30th.

LAKE *v.* DE LAMBERT.

Decree diſcharging from a truſt, a woman who had married a foreigner; though the anſwer denied an intention of quitting the kingdom, and ſtated her deſire of continuing in the truſt.

BY a ſettlement, dated the 18th and 19th of *May*, 1795, previous to the marriage of *Willoughby Thomas Lake* and *Charlotte Ann Macbride*, a moiety of certain real eſtates, of which Miſs

Macbride was ſeiſed in fee, ſubject to the life eſtate of her father Admiral *Macbride*, was conveyed to *Preſtwood Harriſon*, the aunt of Miſs *Macbride*, and *William Ely Cook*, and their heirs, to the uſe, after the marriage and ſubject to the ſaid eſtate for life, of Mr. *Lake*, for life, without impeachment of waſte; remainder to Mrs. *Lake* for life, without impeachment of waſte; remainder to the uſe of the children of the marriage, as tenants in common, with croſs remainders; with reverſion to the right heirs of Mrs. *Lake*.

By the ſame ſettlement certain ſtock and bonds, to which, it was recited, that Miſs *Macbride* was entitled, to the amount of 13,000 *l.*, were agreed to be transferred to the ſame truſtees, in truſt after the marriage to permit Mr. *Lake* to receive the intereſt and dividends for his life; and after his deceaſe to permit Mrs. *Lake* to receive the intereſt and dividends for her life; and after the deceaſe of the ſurvivor in truſt for the children of the marriage equally, and their children, if any ſhould be then dead leaving iſſue, were to take their parents' ſhare equally; and if there ſhould be but one child, in truſt for that one; and if there ſhould be no child, or iſſue of any child, then living, in truſt for the right heirs of Mrs. *Lake*.

By indentures, dated the 29th and 30th of *September* 1795, made after the marriage, the truſtees ſold the real eſtate mentioned in the ſettlement for the ſum of 6000 *l.*; of which ſum 1500 *l.* was the purchaſe-money of the life eſtate of Admiral *Macbride*. The ſaid ſum of 6000 *l.* was under a power in the ſettlement ſecured by mortgage upon the truſts declared by the ſettlement as to the ſtock and bonds therein mentioned.

Preſtwood Harriſon afterwards married *Lambert Fochier De Lambert*.

By indentures, dated the 2d of *June* 1797, reciting, that the recital in the marriage ſettlement, that Mrs. *Lake* was entitled to ſtock and bonds to the amount of 13,000 *l.* was erroneous; and that ſhe was entitled only, excluſive of the real eſtate, to the ſum of 7693 *l.*, her ſhare of the money ariſen by ſale of the eſtate of her mother, the intereſt whereof was payable to Admiral *Macbride* for life, and which ſum of 7693 *l.* had been received by him; and reciting, that the ſum of 3500 *l.* five *per cent.* Bank annuities, and 1000 *l.* four *per cent.* Bank annuities, part of the ſaid ſum of 7693 *l.*, had been transferred to *Preſtwood De Lambert* and *William Ely Cook*; and that the ſum of 215 *l.*, other part thereof, had been laid out in the purchaſe of 413 *l.* 5 *s.* 7 *d.* Bank annuities in their names, and that Admiral *Macbride* in conſideration, that he had made no proviſion for 3093 *l.*, the reſidue thereof, and of natural love and affection for his daughter, had agreed to give up the ſum of 1500 *l.*, to which he was entitled, as his ſhare of the ſum of 6000 *l.* due upon mortgage, and that he had ſecured the ſum of 1593 *l.*, the reſidue of the ſaid ſum of 7693 *l.* by his bond of even date to *Preſtwood De Lambert* and *William Ely Cook*; and farther reciting, that for effectuating in part the agreement between the parties *Lambert Fochier De Lambert* and *Preſtwood*, his wife, and Admiral *Macbride*, had by indentures, executed the day before the date hereof, with the approbation of *Lake* and his wife and *William Ely Cook* aſſigned to *George Cook*, his executors and adminiſtrators, the principal ſum of 6000 *l.* ſecured by mortgage, and all intereſt due and to grow due thereon; in truſt forthwith to aſſign the ſame unto *Preſtwood De Lambert* and *William Ely Cook*, their executors, adminiſtrators, and aſſigns; it was witneſſed, that *George Cook* by the directions of Admiral *Macbride* and Mr. and Mrs. *Lake* did aſſign the ſaid ſum of 6000 *l.* and the ſecurities for the ſame to *Preſtwood De Lambert* and *William Ely Cook*, their executors, adminiſtrators, and aſſigns, upon the truſts declared by the marriage ſettlement of Mr. and Mrs. *Lake* concerning the ſtocks and bonds therein mentioned; and it was declared, that the receipt of the ſaid *Preſtwood De Lambert* and *William Ely Cook* ſhould be a ſufficient diſcharge for the ſaid ſums of 6000 *l.* and 1593 *l.*; and that the ſaid Bank annuities and the ſums of 6000 *l.* and 1593 *l.* were reſpectively transferred, purchaſed, aſſigned, and ſecured, and that they, the ſaid *Preſtwood De Lambert*, (the ſaid *Lambert Fochier De Lambert*, her huſband, thereby conſenting and agreeing thereto) and *William Ely Cook*, the ſurvivor of them, and the executors, adminiſtrators, and aſſigns, of ſuch ſurvivor, ſhould ſtand poſſeſſed thereof, upon the truſts of the ſettlement of the 19th of *May* 1795.

The bill was filed in *February* 1798 by Mr. and Mrs. *Lake* againſt *De Lambert* and his wife and *William Ely Cook*; charging, that *De Lambert* is a native of *France*, and in conſequence of the troubles of that country came to *England*; and that he intends to return to *France*, or go to ſome place out of *England*, as ſoon as he can with ſafety and convenience, and to take his wife with him. The bill therefore prayed, that the defendant *Preſtwood De Lambert* may be diſcharged from being a truſtee; and that a new truſtee may be appointed; *&c.*

The defendant *Lambert Fochier De Lambert* by his anſwer ſtated, that he is a native of *France*; that he was an officer in the army of the late king *Lewis* the ſixteenth, and is a knight of the military Order of *St. Louis;* that he was employed as inſpector-general at *Lyons*, when the army there was diſperſed and maſſacred; and that being in the greateſt danger on account of his loyalty and attachment to the king he was obliged to fly; and that he is married and permanently ſettled in this country. He denied, that he intends to return to *France*, or to go to any other place out of *England*, as ſoon as he can with ſafety and convenience, and to take his wife with him: on the contrary he intends to remain in *England*; and has lately taken a houſe at *Carmarthen* upon a leaſe for ninety-nine years; and has laid out a conſiderable ſum of money to render it convenient for his reſidence.

The defendant *Preſtwood De Lambert* by her anſwer ſtated, that ſhe conſented at the expreſs deſire of Mrs. *Lake* to be a truſtee, and through regard and affection for her niece. She confirmed the anſwer of her huſband as to their intention of remaining in this country; and ſtated, that ſhe is deſirous of continuing in the truſt.

The cauſe came on upon bill and anſwer.

Mr. *Mansfield* and Mr. *Harvey for the plaintiffs* ſaid, the decree was of courſe according to the prayer of the bill.

Mr. *Romilly for the defendants De Lambert and his wife* obſerved, that ſhe was willing to continue a truſtee; but ſubmitted to what the Court ſhould direct.

The Lord Chancellor remarked, that it was very inconvenient for a married woman to be a truſtee.

The decree was made according to the prayer of the bill.

1799.

Rolls,
April 30.

HOVEY *v.* BLAKEMAN.

One executor in truſt is not anſwerable for the receipts of the other merely by taking probate, permitting the other to poſſeſs the aſſets, and joining in acts neceſſary to enable him to adminiſter: otherwiſe, if he goes farther, and concurs in the application.

Agents being alſo appointed executors of the principal are not entitled to commiſſion upon remittances from *India* by the teſtator not received until after his death.

JOHN BLAKEMAN of *Bombay* in the *Eaſt Indies* by his will, dated the 1ſt of *July* 1787, after giving 14,000 Rupees to his executors, upon truſt to inveſt the ſame in *India*, and to apply the intereſt and produce for the benefit of his houſe-keeper *Bibee Jaun* during her life, and after her death to ſink into the reſidue of his eſtate, and after giving to her his wearing-apparel and other effects, gave all the reſt, reſidue, and remainder, of his monies, debts, effects, and ſecurities for money, and all other eſtate and effects both real and perſonal, or of what nature or kind ſoever, both in the *Eaſt Indies* and in *Great Britain*, and whereſoever elſe may be ſituated, unto *Daniel Crokatt* and *John Forbes* of *Bombay*, and to his brother *Jeremiah Blakeman* and *Richard Smith* of *London*, their executors, adminiſtrators, and aſſigns, upon the truſts following: that is to ſay; that they, his ſaid executors, and the ſurvivors and ſurvivor of them, ſhould lay out and inveſt all his perſonal eſtate at intereſt upon real or government ſecurities in their own names, or the name of ſuch of them as ſhould from time to time live and reſide in *Great Britain*; whither it was his deſire all his property remaining in the *Eaſt Indies*, after providing for the before-mentioned bequeſts, might be remitted as ſoon as might be after his deceaſe; and ſhould pay and apply the whole yearly rents and profits, intereſt and dividends, of all the ſaid reſidue of his eſtate yearly and every year, or oftener, as might be, to the uſe of his mother *Eleanor Blakeman* for life; and after her deceaſe he gave the ſaid reſidue, and all ſecurities for the ſame, one-fourth to his brother *Jeremiah Blakeman*, his executors, adminiſtrators and aſſigns; one-fourth to his younger brother *James Blakeman*, his executors, adminiſtrators and aſſigns; and the other two-fourths he gave to *Jeremiah Blakeman* and *Richard Smith*, their executors, adminiſtrators and aſſigns, upon the truſts following: that is to ſay, that they and the ſurvivor, and the executors or adminiſtrators of ſuch ſurvivor, ſhould from time to time pay the yearly or other rents, profits, intereſt or dividends, in equal diviſion, ſhare and ſhare alike, to his (the teſtator's) ſiſters *Hannah Hovey* and *Eleanor Butcher*, ſo long as they ſhould reſpectively live, for their ſole and ſeparate uſe; and after the deceaſe of each of his ſaid ſiſters to pay one moiety of the ſaid two-fourth parts of the reſidue of his eſtate unto and among all and every the child or children of ſuch of his ſaid ſiſters ſo dying, which ſhould be living at the time of her deceaſe, or the iſſue of ſuch as ſhould be then dead, ſhare and ſhare alike; ſuch iſſue to take only the ſhare of the parent; and if there ſhould be but one child, or the iſſue of one, then living, the whole to ſuch child or iſſue; and he appointed *Daniel Crokatt*, *John Forbes*, *Jeremiah Blakeman*, and *Richard Smith*, and the ſurvivors and ſurvivor of them, joint executors of his will: his intention nevertheleſs being, that ſuch of his ſaid executors as ſhould from time to time be in *Great Britain*, and the ſurvivor of them, his executors or adminiſtrators, ſhould be the acting truſtees and executors or truſtee and executor, or have a right ſo to act in regard to his eſtate and property in *Great Britain*.

The teſtator died in the ſame year, ſoon after the execution of his will. His mother died in *May* 1787. The will was proved in *India* by *Crokatt* and *Forbes*, and in *England* by *Jeremiah Blakeman* and *Smith*.

James Blakeman died in 1792. *Jeremiah Blakeman* was one of his executors.

The bill was filed in 1795 by *Hovey* and his wife againſt *Jeremiah Blakeman* and *Richard Smith*, Mr. and Mrs. *Butcher*, and their children, and other perſons; praying an account of the ſums remitted to the defendants *Blakeman* and *Smith* by the teſtator, or ſince his death, on account of his eſtate; and that the reſidue may be aſcertained, with the conſequential directions.

The defendants *Jeremiah Blakeman* and *Richard Smith* by their joint anſwer admitted, that the teſtator did in or about the month of *October* 1786 remit to theſe defendants a *Canton* bill, value 2176 *l.* 16 *s.* 8 *d.*: and did afterwards in or about the month of *December* 1786 by *Bengal* bills upon the *Eaſt India* Company remit to them divers large ſums of money, amounting in the whole to the ſum of 12,012 *l.* 14 *s.* 8 *d.*; making together the ſum of 14,189 *l.* 11 *s.* 4 *d.*; with directions to theſe defendants to inveſt the ſame in government or other good ſecurity. They ſtated, that the teſtator remitted ſuch ſums to them in conſequence of their having conſented upon his requeſt to act as his agents in *England* under a power of attorney; and, the ſaid ſums having been remitted to theſe defendants as agents for the ſaid *John Blakeman*, theſe defendants do claim, and ſubmit to the judgment of the Court, that they are entitled to charge as commiſſion upon the ſaid ſums 2½ *per cent.*, being the commiſſion uſually charged upon monies remitted from *India*.

The defendants farther admitted, that *Crokatt* and *Forbes* did in or about the year 1789 and 1790 remit part of the effects of the teſtator to *Jeremiah Blakeman*; and that the ſame did amount to the ſum of 4,349*l.* 13*s.* 4*d.* in bills from *India* at different dates and times of payment. They ſtated, that, *John Blakeman* having remitted to theſe defendants the ſaid *Canton* bill upon the *Eaſt India* Company for 2,176*l.* 16*s.* 8*d.*, which ſum was part of the aforeſaid ſum of 14,189*l.* 11*s.* 4*d.*, and theſe defendants having received the amount of ſuch bill in or about the month of *May* 1788, they thereout paid to *James Blakeman* 242*l.* 16*s.* 8*d.* which appeared due to him from the teſtator; and they inveſted the ſum of 1,922*l.* 1*s.* 3*d.* in the purchaſe of 2,550*l.* 3 *per cent.* Conſolidated Bank Annuities; whereby the balance remaining in their hands in reſpect of ſuch ſum of 2,176*l.* 16*s.* 8*d.* was 11*l.* 18*s.* 9*d.* They ſay, the teſtator was indebted to *Jeremiah Blakeman* in 747*l.* 1*s.* 3*d.* The defendant *Smith* ſays, that he believing the demand of the defendant *Jeremiah Blakeman* to be a fair and juſt demand did conſent to 1050*l.*, part of the ſaid ſtock being ſold for the payment of it and of certain charges, which theſe defendants had incurred as executors. They ſay, that the mother of the teſtator having died, theſe defendants did divide and apply the remainder of the ſaid 2,550*l.* Bank Annuities, as directed by the will; and placed 375*l.* thereof to the account of the plaintiff, and 375*l.* to the account of *Eleanor Butcher*; and for this defendant *Jeremiah Blakeman* did ſell out the like ſum of 375*l.* 3 *per cents.* They ſay, the ſaid two ſeveral ſums of 375*l.* are part of a large ſum ſtanding in the joint names of theſe defendants in truſt for *Hannah Hovey* and *Eleanor Butcher*. They admit, that they received on account of the intereſt and dividends upon the 2,550*l.* Bank Annuities 38*l.* 5*s.*; which they divided into four parts; and have duly paid to *Hannah Hovey*, *James Blakeman* and *Eleanor Butcher*, their reſpective ſhares thereof. The teſtator having about *December* 1786 remitted to theſe defendants certain *Bengal* bills for divers ſums, amounting to 12,012*l.* 14*s.* 8*d.*, part of the ſaid ſum of 14,189*l.* 11*s.* 4*d.*, and the defendant *Jeremiah Blakeman* having received the ſaid bill in or about *July* 1787, this defendant *Jeremiah Blakeman*, ſaith, and this defendant *Richard Smith* believes it to be true, that *Jeremiah Blakeman* did about the 24th of *November* 1788 deliver ſix of the ſaid bills, amounting to 3000*l.*, to *James Blakeman*, and alſo paid him 3*l.* 3*s.* 8*d.*, being one fourth of 12,012*l.* 12*s.* 8*d*; and the defendant *Jeremiah Blakeman* did appropriate ſix other of the ſaid bills, amounting to 3000*l.* to his own uſe; and *Jeremiah Blakeman* did receive the amount of the remaining bills, and alſo ſeveral ſums of money remitted by *Crockatt* and *Forbes*, and inveſted the ſame, as ſet forth in the ſchedule. They admit, that *Crokatt* and *Forbes* did remit to theſe defendants ſeveral ſums of money; and that one moiety or half part thereof belonged to, and was appropriated for, *Hannah Hovey* and *Eleanor Butcher*. They ſay, they have regularly paid to *Hannah Hovey* the dividends and intereſt of one fourth of the reſidue ſo laid out and inveſted in the names of theſe defendants.

The defendants deny, that they, or either of them to the knowledge or belief of the other, have employed the money for their own benefit; except, as *Jeremiah Blakeman* was entitled as a creditor and as one of the reſiduary legatees: on the contrary the defendants ſay, the teſtator's perſonal eſtate has been regularly divided, and the ſhares of *Hannah Hovey* and of *Eleanor Butcher* laid out in 3 *per cent.* Conſolidated or Reduced Annuities, ſhortly after the ſame came to the hands of theſe defendants or of either of them; ſave and except a ſmall part thereof remaining in their hands. They ſay, they have regularly paid to *Hannah Hovey* her ſhare of the intereſt of the reſidue, ſo by theſe defendants laid out, and alſo her ſhare of the intereſt of all other ſums of money received by theſe defendants or either of them; and they have now in their hands the ſum of 520*l.* 9*s.*, or thereabouts, belonging to the plaintiff *Hannah Hovey* and the defendant *Eleanor Butcher*, beſides the ſum of 12*l.* 4*s.* 5*d.*, being a moiety of the ſaid balance of 24*l.* 8*s.* 10*d.*, making together 532*l.* 13*s.* 5*d.*; out of which they claim to be allowed the ſum of 179*l.* 9*s.* 3*d.*, the amount of commiſſion accruing to them at the rate of 2½ *per cent.* upon the ſum of 7094*l.* 15*s.* 8*d.*, being the moiety or half of the ſaid ſum of 14189*l.* 11*s.* 4*d.*

The defendants ſubmit, whether they ought not to be allowed as executors of the teſtator a commiſſion at the rate of 5 *per cent.*

upon

1799.

Hovey
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upon all ſums of money received by them as executors; being adviſed, that ſuch commiſſion is allowed to executors in *India*; and the teſtator having died in *India*; and more eſpecially as this defendant *Richard Smith* is not compenſated for his trouble as executor by the will. They ſubmit, that they ought not to be required to inveſt the aforeſaid balance of 520*l.* 9*s.*, due to *Hannah Hovey* and *Eleanor Butcher*, or the ſaid ſums of 11*l.* 18*s.* 9*d.* and 12*l.* 10*s.* 1*d.*, making together 24*l.* 8*s.* 10*d.*, being the general balance of the reſidue, until the claim inſiſted upon by *James Blakeman* in his lifetime to the ſum of 272*l.* 3*s.* 9½*d.*, as due to him from the teſtator, is determined. They ſay, there is now ſtanding in the joint names of theſe defendants the ſum of 4750*l.* in the 3 *per cent.* Conſolidated Annuities, and the ſum of 5200*l.* in the 3 *per cent.* Reduced Annuities, in truſt for *Hannah Hovey* and *Eleanor Butcher*.

By the decree, made on the 18th of *June* 1796, it was referred to the Maſter to take the accounts; and an inquiry was directed, whether any thing and what was due to the defendants *Jeremiah Blakeman* and *Richard Smith* for commiſſion upon money received by them as agents for the teſtator in his life; at what times the monies remitted by the teſtator in his life and by his executors in *India* ſince his death to the defendants *Blakeman* and *Smith* came to their hands; and how the ſame had been applied and diſpoſed of; and it was ordered, that the 4750*l.* 3 *per cent.* Conſolidated Bank Annuities, and the 5200*l.* Reduced Annuities, admitted by the anſwer to be ſtanding in the names of the ſaid defendants in truſt for *Hannah Hovey* and *Eleanor Butcher*, ſhould be transferred to the Accountant General; and by conſent of the ſaid defendants one moiety of the intereſt and dividends was ordered to be paid to *Hannah Hovey*, and the other to *Eleanor Butcher*, for their ſeparate uſe. The coſts down to the hearing were given out of the teſtator's eſtate.

After this decree the defendant *Jeremiah Blakeman* became bankrupt; upon which a ſupplemental bill was filed; and under that a decree was made on the 20th of *February* 1797.

The Maſter's Report ſtated, that the teſtator in *January* 1785 executed a power of attorney to the defendants *Blakeman* and *Smith* to act as his attorneys in *England*; and afterwards remitted to them a *Canton* bill for 2176*l.* 16*s.* 8*d.*, payable to them or order at 365 days' ſight, without intereſt; which came to their hands in *May* 1787, and became payable about *May* 1788; when the ſaid defendants received the money thereon; which was after the teſtator's death: his death happening in the *Eaſt Indies* in 1787. The ſaid defendants did either as attorneys or executors pay out of that money to *James Blakeman* 242*l.* 16*s.* 8*d.* in purſuance of the directions of the teſtator; and inveſted 1922*l.* 1*s.* 3*d.*, other part thereof, in 2550*l.* Conſolidated Bank Annuities 3 *per cent.*; by which payments there is a balance due from the eſtate of the defendant *Blakeman* and from *Smith* of 11*l.* 18*s.* 9*d.* The ſaid defendants received for one half year's dividends of the ſaid 2550*l.*, due on the 5th of *July* 1788, 38*l.* 5*s.*; which was divided into four parts; and the ſum of 9*l.* 11*s.* 3*d.* a-piece was paid to *James Blakeman*, *Elizabeth Butcher*, and *Hannah Hovey*; and the ſame ſum was retained by the defendant *Blakeman*. Soon afterwards 1500*l.* part of the ſaid 2550*l.* Bank Annuities, was diſpoſed of, *viz.* 375*l.* transferred to *James Blakeman*, and the ſame to the defendant *Jeremiah Blakeman*, as reſiduary legatees; and 750*l.* reſerved for *Hannah Hovey* and *Eleanor Butcher* and their children. The remaining 1050*l.* Bank Annuities were ſold by the ſaid executors for 776*l.* 16*s.* 9*d.*; of which 764*l.* 6*s.* 8*d.* was thus diſpoſed of, *viz.* 747*l.* 1*s.* 9*d.* was retained by the defendant *Blakeman* as a debt due to him; and the remainder was applied for the probate and other expences. The balance due from the eſtate of the defendant *Blakeman* and from *Smith* was 12*l.* 10*s.* 1*d.*; making together with the ſaid 11*l.* 18*s.* 9*d.* the ſum of 24*l.* 8*s.* 10*d.*; the balance remaining on account of the joint receipt of the ſaid defendants *Jeremiah Blakeman* and *Richard Smith*, and now due from the ſaid defendants as the agents or attorneys in *England* of the teſtator.

The Report farther ſtated, that various other remittances were made by the teſtator to the defendant *Blakeman* by bills at a long date upon the Court of Directors of the *Eaſt India* Company drawn by the teſtator in favor of himſelf and the defendant *Blakeman*, which did not come due until after the death of the teſtator, amounting together to 12,012*l.* 14*s.* 8*d.*; and which bills came to the hands of the defendant *Blakeman*; and the value thereof was received by him, as they reſpectively became due. Other remittances were made by *Crokatt* and *Forbes* after the teſtator's death to the defendants *Blakeman* and *Smith*, alſo by bills in their favour, amounting together to 4394*l.* 13*s.* 4*d*; making with the former ſum 16,362*l.* 8*s.* The defendant *Smith* did not indorſe any of the ſaid bills ſo remitted by the ſaid executors, except two *Canton* bills for 1000*l.* each; which came to the hands of the defendant *Blakeman* on the 29th of *Auguſt* 1790, and two *Bengal* bills for 500*l.* and 197*l.* 19*s.* 6*d.*, which came to the hands of *Blakeman* on the 24th of *March* 1792; which were the only bills indorſed by *Smith* either jointly with the defendant *Blakeman* or alone. One of the ſaid bills ſo remitted by the executors in *India* to the defendants *Blakeman* and *Smith* for 600*l.*, payable to them or their order, upon *James Sibbald*, came to the hands of *Blakeman* alone on the 3d of —— 1790; who indorſed the ſame for himſelf and *Smith*; and received the amount; and afterwards informed *Smith* thereof.

The Report then ſtated, that the defendant *Blakeman* divided the amount of one moiety of the ſaid bills between *James Blakeman* and himſelf, as two of the reſiduary legatees; and inveſted in the names of himſelf and *Smith* in 3 *per cent.* Conſolidated and Reduced Bank Annuities, in truſt for *Hannah Hovey* and *Eleanor Butcher* and their children, as the other reſiduary legatees, various ſums on account of their moiety; whereby the defendant *Blakeman* has retained to himſelf, and paid to his brother, their reſpective ſhares in the ſaid bills and money received by him; and the money inveſted in truſt for *Hannah Hovey* and *Eleanor Butcher* and their children ſubſequent to the 29th of *Auguſt* 1790 amounts to 7660*l.* 15*s.*; which is leſs than their moiety of the ſaid bills and the money received thereon by the ſum of 520*l.* 9*s.*; which ſum is now remaining due to them; which with the ſaid ſum of 24*l.* 8*s.* 10*d.* amounts to 544*l.* 17*s.* 10*d.*; which the Maſter finds to be remaining due from the ſaid defendants, as ſet forth in their anſwer; and by their anſwer they admit to have in their hands belonging to the teſtator's eſtate 520*l.* 9*s.*

The Report then ſtated the Bank Annuities purchaſed on account of the truſt for *Hannah Hovey* and *Eleanor Butcher* and their children, as ſet forth in the anſwer; and the Maſter found, that nothing was due to the defendants *Blakeman* and *Smith* for commiſſion upon money received by them as agents for the teſtator in his life time; as the money, which was received by them as attorneys, was wholly received after his death; the bills, though remitted in his life, not becoming due until after his death.

The cauſe coming on upon this Report for farther directions, two queſtions were made:

Firſt, whether the defendant *Smith* was chargeable with the balance remaining due on account of the teſtator's eſtate?

Secondly, whether the defendants were entitled to commiſſion, as claimed by their anſwer?

Mr. Piggott and Mr. Stanley for the plaintiffs, Mr. Richards Mr. Pemberton and Mr. Wooddeſon for the defendants Mr. and Mrs. Butcher and their children—Upon the firſt point, both theſe defendants are chargeable. They have put in a joint anſwer, admitting the receipt of this money, and that money is in their hands due to the eſtate, and applicable to theſe legacies. *Sadler* v. *Hobbs* (*a*) and Mr. *Fonblanque*'s note (*b*). The only caſe, that can be cited on the other ſide, is *Balchen* v. *Scott* (*c*): but in that caſe the executor had done no other act than proving the will; and the circumſtance, upon which it was attempted to charge him, was not his own act, but merely receiving by poſt a bill for a debt due to the eſtate; which he immediately handed over to the acting executor. An acknowledgment by the anſwer is ſtronger than the mere circumſtance of ſigning a receipt.

This is not a cauſe concerning a general reſidue. The bill is filed by ſome of the reſiduary legatees, complaining of injuſtice done to them by the executors and the other reſiduary legatees. Theſe executors have taken care of themſelves and their own friends. The executors by their joint anſwer admit money to be in their hands; and they ſet up a claim of commiſſion due to them. They alſo ſet up a claim of *James Blakeman* upon the reſidue. That was another ſubterfuge; and was abandoned. The claim of commiſſion prevented the Court from ordering the money to be paid in by the defendants: an enquiry being neceſſary as to that: otherwiſe there would have been a decree againſt both. Then ſhall theſe unfounded claims, the Maſter having

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(*a*) 2 *Bro. C. C.* 114. (*b*) 2 *Fonb. Treatiſe of Equity*, 184. (*c*) *Ante*, vol. 2. 678.

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reported, that no commiſſion is due, vary the decree? There is nothing in the Report ſhewing, that the defendant *Blakeman* acted without the concurrence and privity of *Smith*. The contrary appears. There is no difference between receiving the money himſelf and ſtanding by and permitting the other to receive it. Whom did he intruſt? A perſon liable to the bankrupt laws and a family truſtee. It is incumbent on a truſtee to make the fund productive. The Court will not ſuffer him to be partly active and partly ſupine. A truſtee muſt at leaſt ſee, that his co-truſtee does his duty as to thoſe acts, which he cannot accompliſh, unleſs the former is inſtrumental; who truſts the other at his peril. This teſtator did not think it provident to commit the ſole management of his affairs even to his brother. Will the Court fruſtrate the wiſdom of that precaution?

As to the claim of commiſſion the Maſter is clearly right in his opinion; and the reaſon he has given is deciſive.

Mr. Graham and Mr. Fonblanque for the defendant Smith—The ſafety of truſtees ought to be ſecured by every poſſible indulgence a Court of equity can give them. They are not to be held to ſtrict law. Equity endeavours to attach reſponſibility upon actual receipt. The old caſes are preciſely to that point. The modern caſes have gone as far as they ought at leaſt; conſidering the neceſſity of not diſcouraging people from being truſtees. An act to charge a truſtee muſt be an act, that was not of neceſſity. The diſtinction in *Churchill* v. *Lady Hobſon* (*a*) and the other caſes is, that, where truſtees have joined, there being a neceſſity for all joining, they have been conſidered as only formally joining: but one executor being competent to act by himſelf, the Court jealous of the circumſtance of an executor having joined without neceſſity holds him liable in that reſpect. Lord *Northington*, though his authority is rather queſtioned by Lord *Thurlow*, ſeemed not to conſider it abſolutely concluſive in the caſe of executors (*b*); as if ſomething is impoſed upon them, which does not naturally belong to the character of executor; for inſtance a power to ſell an eſtate; which gives the character of a truſtee. In *Sadler* v. *Hobbs* there was what the Civilians call *lata culpa*. Formerly it was conſidered quite

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(*a*) 1 *P. Wms.* 241.

(*b*) See *Weſtley* v. *Clarke* in Mr. *Cox's* note, 1 *P. Wms.* 83. and *Sadler* v. *Hobbs*, 2 *Bro. C. C.* 114.

enough to diſcharge a truſtee, if he had not pocketed the money. *Boardman* v. *Hoſman* (*a*) goes a little farther: but there were particular circumſtances in that caſe, and in *Sadler* v. *Hobbs* and *Scurfield* v. *Howes* (*b*); and the laſt caſe, *Balchen* v. *Scott*, is in favor of the executor (*c*).

It is plain, there could not have been a decree of courſe againſt both, if an inquiry as to the claim of commiſſion had not been neceſſary. The anſwer therefore is not concluſive. Though a ſolemn admiſſion upon the record is always concluſive at law, where there can be no averment againſt the record, and in ſome particular caſes in this court, as in *Tew* v. *Lord Winterton* (*d*) where an executor by his admiſſion of aſſets for a debt was bound to pay the intereſt upon that debt, yet the ſame ſtrictneſs has never been held in this Court; where the proceedings are always *in fieri;* and as the plaintiff may amend his bill, ſo *in pari ratione* the Court will be indulgent; though for fear of perjury they will not give a general power of altering an anſwer, that is ſworn to. The receipt of money is an equivocal act, and not abſolutely concluſive.

The defendant *Smith* put himſelf into the hands of *Blakeman;* conſidering himſelf a mere inſtrument. He indorſed the bills mechanically. They were made payable to him and *Blakeman* jointly; and though perhaps the indorſement of one would have been ſufficient, yet in the mercantile world bills cannot be negotiated, unleſs indorſed by both payees. *Smith* indorſed the two *Canton* bills merely to enable *Blakeman* to receive them. *Smith* did no more than what was abſolutely neceſſary to make them negotiable. It is impoſſible to aſcribe any ſuch motives to him as thoſe, upon which *Sadler* v. *Hobbs* was decided; where the money was ſuffered to remain a long time. The Report particularly points out, that *Smith* never poſſeſſed himſelf of any part of the eſtate of the teſtator. In one inſtance he did not even indorſe the bill: the bill for 600*l.* was indorſed and received by *Blakeman* alone. As to the objection, that *Smith* truſted his cotruſtee, a perſon ſubject to the bankrupt laws, what could be more correct than employing a mercantile man to put bills of exchange in a proper courſe of negotiation? It cannot be ſuppoſed to have

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(*a*) 1 *Bro. C. C.* 68.

(*b*) 3 *Bro. C. C.* 91.

(*c*) The laſt caſe, *Bacon* v. *Bacon*, poſt. at the Sittings after *Hilary* Term 1800, is alſo in favor of the executor.

(*d*) 3 *Bro. C. C.* 489. *ante*, vol. 1. 451. But there is no Report as to this point.

been done with any improper view. Does not every gentleman ſend his ſecurities to his banker? It is ſaid, that *Blakeman* was a family truſtee. Who was more intereſted to make the moſt of the property? He was himſelf entitled to one fourth of the reſidue. The balance found due, which is exactly that ſtated by the anſwer, is very ſmall in compariſon to the whole property; which amounted to 30,000*l.* It could only have been in the hands of one. It would have been inconvenient to have depoſited it in a banker's in their joint names.

As to the commiſſion upon thoſe remittances, which were not received until after the teſtator's death, it is ſtated in the anſwer rather as a ſubmiſſion than in the ſhape of a claim. The queſtion is ſtill open upon the facts ſtated by the Report; which are ſufficient to ſupport the claim. The bills remitted by the teſtator in his life give a right to the agency commiſſion *ex contractu.* He could not deveſt that right by throwing upon his agents the character of executors. A conſignee of *Weſt India* property, if made executor, would ſtill be entitled to commiſſion. Suppoſe, the remittances had been made by way of inveſtment; would they not be entitled to commiſſion? It is like the old idea, that by making a creditor executor the debt is extinguiſhed; as he cannot ſue himſelf.

Executors of a receiver admitting aſſets bound to anſwer what was upon a ſubſequent inquiry found due for intereſt.

The Maſter of the Rolls during the argument obſerved, that *Tew* v. *Lord Winterton* was thought a very hard caſe. Executors of a receiver had admitted aſſets. An enquiry was directed, what was due for intereſt; and the anſwer was conſidered an admiſſion of aſſets for whatever ſhould be due from the teſtator in his character of receiver. The defendants objected, that they had no idea of intereſt being charged.

Mr. Piggott in reply was ſtopped by the Court.

Maſter of the Rolls—I am ſorry for the defendant *Smith;* who having clothed himſelf with the character of executor is in a ſituation, in which, though perhaps he thought himſelf entitled to ſome remuneration, he now appears not to be entitled to any thing; and will by the effect of the decree I find myſelf obliged to make ſuſtain a loſs, from which I ſhould be glad to relieve him.

The only doubt I have, which I ſhall throw out, is as to the coſts; though it is hardly poſſible to refuſe them the coſts of the account; which was aſked by the plaintiffs from the neceſſity of their own ſituation.

The caſe is, that a teſtator living in *India* made two executors in *India* and two in *England*. The executors in *India* remitted the property in bills to thoſe in *England*. The firſt conſideration is, what are the truſts of the will. It is true, they are executors: but the office devolving upon them combined with a truſt, after payment of the debts they are in fact, though perhaps not in name, in this Court truſtees for ſeveral perſons; of whom two are adult, the others are married women with their children. It is very clear, an executor may join in the probate with his co-executor, and does not by that and by permitting the other executor to poſſeſs aſſets make himſelf anſwerable for the receipts of the other: he is only anſwerable by permitting his co-executor to avail himſelf of the power every executor has of coming at the aſſets, and concurring himſelf in the application of them. Does the defendant *Smith* inſiſt, that he did not join in any act, that was not neceſſary to enable his co-executor to adminiſter them, and did not concur in the adminiſtration? On the contrary he inſiſts, that he concurred in the receipt and the application by *Blakeman*. As long as there was any expectation of commiſſion, *Smith* claimed it with *Blakeman*; and then *Smith* permitted *Blakeman* to pay himſelf and another of the reſiduary legatees, and to inveſt a part of the property in the funds: but he did not take care to ſee, that *Blakeman* did not pay himſelf and that other reſiduary legatee more than the reſt. The moment the anſwer was put in the wiſer thing would have been to have applied immediately for payment of the money: but that would not have prevented the account; for infants are concerned. The decree therefore muſt have directed an account of what was received; and the plaintiffs could not have received the balance, that was admitted.

I admit the rule, that has been truly ſtated, as to truſtees and executors: but to diſcharge this executor would be to do violence to his own idea at the time of putting in the anſwer. I will go as far as any one to exempt one executor from being anſwerable for the receipts of the other; except, where with his eyes open he

Joining in a receipt, though perhaps not abſolutely neceſſary, not concluſive againſt an executor, any more than againſt a truſtee, to charge him with the receipts of his co-executor.

concurs. Some of the caſes, I agree, are extremely rigorous. I have no ſcruple to ſay, I perfectly concur in *Weſtley* v. *Clarke*. The joining in the receipt, though perhaps not abſolutely neceſſary, I will not conſider concluſive: but I muſt overleap every rule, if I do not conſider the defendant *Smith* as not having put himſelf in the ſituation of one executor merely proving the will, and concurring in acts abſolutely neceſſary to enable his co-executor to adminiſter. Conſider the anſwer. When the cauſe came on, it could not be denied, that if the adult plaintiffs were ſolely intereſted, they might have conſented to take their ſhare of the balance admitted to be due: but as they were plaintiffs for themſelves and their children, and infant defendants were alſo concerned, it was abſolutely neceſſary to direct the account; and at the time of the decree no idea was entertained of any ſuch defence as this. There is not a word of ſeparate receipts. Until the bankruptcy they admitted, all the receipts were joint. There is no direction in the decree to diſtinguiſh, how much came to the hands of one, and how much to the other. The caſe now ſtands not only upon the anſwer, but upon the Maſter's Report. If the anſwer had not admitted the receipt to be joint, and if the account ſtood, as it now ſtands, upon the Report, in my opinion I am bound to ſay, the receipts were joint, upon the acts of the defendant *Smith*, not his admiſſions only. He not only permitted *Blakeman* to receive it, merely becauſe he could not receive it without the concurrence of *Smith*, but he joined with *Blakeman* in the adminiſtration. We muſt not diſcourage people from being executors: but if *Smith* did not mean to act, he might as well have let *Blakeman* act alone. I do not mean to diſcourage people from taking probate: but let them take care, if they do not act themſelves, not to concur in any thing but what is abſolutely neceſſary.

As to bills of exchange the indorſement of one is the indorſement of both: but as to thoſe remitted by the teſtator in his life, the circumſtance of his death would not make them liable to pay, unleſs they indorſed them. As to thoſe therefore perhaps his joining would not have bound him. If a bill is tranſmitted to two executors, before they become ſo, payable to them perſonally, the joining of one, after they are executors, merely by indorſement, to enable the other to receive the money, would not be ſufficient.

Bill of exchange remitted to two agents, payable to them perſonally, who on the death of the principal become his executors: the mere indorſement of one, after they are executors, in order to enable the other to receive the money, is not ſufficient to charge him, who does not receive it.

The caſes are collected by Mr. *Fonblanque* in his book (*a*); which has great merit; and which I have read very attentively. He very ſeldom ſtates an opinion of his own, but refers to the caſes; and his inferences in general are very well warranted. I do not quarrel with *Sadler* v. *Hobbs*: but I do not think with Lord *Thurlow*, that *Weſtley* v. *Clarke* went too far. But in this caſe it is impoſſible to releaſe the executor without violating his own idea of the character he ſtood in. By his admiſſions *Blakeman*'s acts were his acts. He concurred in them. He would not have done his duty, if he had not taken upon himſelf to inſpect *Blakeman*'s conduct. Then why did he not take care, that *Blakeman* ſhould not pay himſelf and one of the reſiduary legatees in preference to the reſt?

As to the claim of commiſſion, the firſt queſtion is, whether, if the bills were remitted to them, before they were executors, a right attached in them to have commiſſion; and, if they were not made executors, and trover had been brought againſt them by the executors, whether they would have been entitled to commiſſion. As to *Indian* commiſſion the claim is clearly wrong. I could not have aſked the Maſter that. The Maſter has given a complete anſwer to the claim; ſtating, that nothing was due for commiſſion; becauſe the money was received after the teſtator's death. If commiſſion was due, exceptions ought to have been taken to the Report. I remember a very ſtrong caſe, applicable to this point, upon *Weſt India* conſignments, *Beckford* v. *Beckford*; which went to the Houſe of Lords. All conſignments were to be made by the truſtees in the *Weſt Indies* to the defendant; and in conſequence they made the conſignments to his houſe here; and ſent the bills of lading. The Court thought, that as ſoon as the plaintiff came of age he had a right to theſe conſignments; and the moment he came of age he ſent out orders to ſtop the produce, which was conſigned to the other houſe; and he filed a bill to compel the defendant to deliver up the bills of lading. Lord *Thurlow* thought, the defendant was bound to deliver over the bills of lading, and had no right to the conſignments. That decree was affirmed in the Houſe of Lords: but it was thought a very harſh demand of Mr. *Beckford* againſt his brother.

Plaintiff being entitled upon coming of age to the produce of a *Weſt India* eſtate, bills of lading of conſignments previouſly made were decreed to be delivered up to him.

(*a*) *Treatiſe of Equity*, vol. 2. 184.

Upon this caſe I muſt ſuppoſe the Maſter right; and that no commiſſion was due. As to the other point I muſt make a perſonal decree againſt the defendant *Smith*.

By the decree it was declared, that the balances ſtated in the Report were due from the defendant *Smith* and from the eſtate of *Jeremiah Blakeman*; and it was directed, that *Smith* ſhould pay the reſidue of what was due on account of *Hannah Hovey* and *Eleanor Butcher* and their children, after deducting the coſts of himſelf and *Blakeman* down to the hearing, into Court; and that out of that money the coſts of all parties, except the ſubſequent coſts of *Smith* and *Blakeman* be paid to the ſeveral parties; and the reſidue divided into two equal parts; one moiety for *Hannah Hovey* and her children; the other for *Eleanor Butcher* and her children; the dividends to be paid to *Hannah Hovey* and *Eleanor Butcher* for their lives reſpectively, with liberty to apply upon their reſpective deaths; and it was ordered, that *Smith* ſhould be at liberty to prove what he ſhould pay as a debt under the Commiſſion of bankruptcy againſt *Blakeman*.

May 4.

CROSBIE *v.* MACDOUAL.

(The Maſter of the Rolls for the Lord Chancellor.)

All codicils are part of the will. Therefore a codicil merely for a particular purpoſe, as to change an executor, and confirming the will in all other reſpects, does not revive a part of the will revoked by a former codicil.

GENERAL *Croſbie* by his will, dated the 27th of *May* 1790, and atteſted by two witneſſes, directed, that all his debts, legacies, and annuities, therein mentioned ſhould be fully paid and ſatisfied, and alſo all ſuch other annuities and legacies as he ſhould at any time hereafter leave by any codicil or codicils or note or memorandum thereof in his own hand-writing ſhould be taken as part thereof; and, ſubject thereto, and charged and chargeable therewith, the teſtator gave and bequeathed all his monies in the public funds, mortgages, bonds, bills, notes, debts, and all other his perſonal eſtate of what nature or kind ſoever and whereſoever, unto *John Antrobus*, *Andrew Elliot*, *John Otto Boyer*, and *John Jackſon*, their executors and adminiſtrators, and to the ſurvivor, his executors, *&c*; upon truſt as ſoon as conveniently might be after his deceaſe to lay out the ſame in the purchaſe of lands of fee-ſimple; and that the ſame, when purchaſed, ſhould be conveyed to the ſaid truſtees and their heirs, upon truſt in the firſt place to ſecure the ſeveral annuities after given.

The teſtator then gave to his ſiſters *Elizabeth Roſs* and *Frances Croſbie*, each, for and during the term of their natural lives, an annuity or clear yearly rent-charge of 300 *l.* by half-yearly payments, to commence from and immediately after his deceaſe; and he gave unto his ſiſter-in-law Mrs. *Sarah Croſbie*, the wife of his brother *Charles Croſbie*, for and during the term of her natural life one other annuity or clear yearly rent-charge of 200 *l.*, to commence from and immediately after his deceaſe; and he declared, that the ſaid three annuities were given upon the expreſs condition and to be conſidered in full ſatisfaction of all annuities or yearly ſums of money, which he then paid, or might at any time pay, them or either of them, whether ſecured by bond or otherwiſe; and in ſuch caſe he directed ſuch ſecurities to be delivered up. Then after ſome other annuities he gave unto the ſaid *Sarah Croſbie*, in caſe ſhe ſhould ſurvive *Charles Croſbie*, her huſband, one annuity or clear yearly rent-charge of 300 *l.*, to commence and become payable from and immediately after his deceaſe, over and above the annuity of 200 *l.* before given to her; and after payment of the ſaid annuities, and all ſuch annuities and legacies as he ſhould give by that his will or any codicil or codicils in writing, and ſubject thereto, then upon truſt to permit his brother *Charles Croſbie* to receive the rents and profits for life; remainder to truſtees to preſerve contingent remainders; remainder to his ſon *John Croſbie* for life; remainder to truſtees to preſerve contingent remainders; remainder to his firſt and other ſons in tail male; remainder to the teſtator's brother *John Croſbie*, and his firſt and other ſons, in the ſame manner; remainder to the firſt and other daughters of *Charles Croſbie*, his ſon *John Croſbie*, and the teſtator's brother *John Croſbie*, ſucceſſively, in tail general; and in default of ſuch iſſue to ſuch uſes as the teſtator ſhould by any deed or deeds in writing, or by any codicil or codicils in writing to that his will, duly executed in the preſence of two or more credible witneſſes, direct, limit or appoint. He directed the intereſt and dividends of his perſonal eſtate, until laid out, to be applied to the legacies and annuities, and the ſurplus to the perſons

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entitled under the will, as if it had been inveſted in real eſtate; and he appointed his truſtees executors.

By two codicils, dated the 29th of *May* 1790, the teſtator gave ſome annuities and legacies; and gave ſome directions for the maintenance and education of his natural ſon *Charles Carr Carmichael*.

By the fourth codicil, dated the 2d of *June* 1795, duly executed to paſs real eſtate, the teſtator reciting, that he had by his will given and bequeathed unto his ſiſter-in-law *Sarah Croſbie*, the wife of *Charles Croſbie*, for the term of her natural life one annuity or clear yearly rent-charge of 200*l.*, thereby revoked and made void the ſaid bequeſt and all and every other bequeſt in his ſaid will to ſaid *Sarah Croſbie*; and reciting, that ſince the making his ſaid will he had purchaſed ſeveral freehold eſtates at *Sunning Hill*, *Berks*, he deviſed the ſaid eſtates to the truſtees named in his will upon the ſame truſts as by his will were directed concerning his perſonal eſtate; and by virtue of the power, he had reſerved in and by his laſt will and teſtament, and of all other powers, he did by that his codicil appoint his ſaid newly purchaſed real eſtate, and all his perſonal eſtate, and the ſame, when inveſted in the purchaſe of meſſuages, lands, tenements, and hereditaments, upon the truſts of his ſaid will, ſubject to the uſes and limitations thereof, to the uſe of the ſaid *Charles Carr Carmichael* for and during the term of his natural life; and, after the determination of that eſtate, to truſtees to preſerve contingent remainders; remainder to his firſt and other ſons in tail male; remainder to his firſt and other daughters; remainder to the teſtator's own right heirs for ever; and he thereby ratified and confirmed his ſaid will and all matters and things therein contained and not thereby altered in all other reſpects.

By the fifth codicil, dated the 4th of *June* 1795, the teſtator reciting, that he had made his will, dated the 27th of *May* 1790, and had thereby ordained, conſtituted, and appointed, *John Jackſon* one of his executors and truſtees under his ſaid will, did thereby make, ordain, conſtitute, and appoint *Robert Mac Doual* to be executor and truſtee of his ſaid will in the place and ſtead of the ſaid *John Jackſon*; declaring, that *Mac Doual* ſhould have full power and authority to act in the execution of his ſaid will as fully as *Jackſon* could have done, if the ſaid codicil had not been made. This codicil concluded with theſe words:

"And I do hereby confirm my ſaid will in all other reſpects."

The laſt codicil was unatteſted.

After the death of the teſtator the bill was filed by his brother *Charles Croſbie* and his ſon *John Croſbie*; praying, that the will might be eſtabliſhed, and the accounts taken; and that the plaintiffs may be declared entitled, according to the will; and that the annuities of 200*l.* and 300*l.* given by the will to the defendant *Sarah Croſbie* may be declared revoked by the fourth codicil, and not to have been revived or ſet up by the fifth.

The only queſtion was upon the latter part of the prayer of the bill, as to the annuities.

Mr. Manſfield and Mr. Lloyd for the plaintiffs, and Mr. Bell for the defendants in the ſame intereſt—The fifth codicil is ſo confined to a particular object, that it could not republiſh the will generally; *Com. Dig.* Title *Deviſe E.* 5. This codicil was made merely to ſubſtitute the defendant as a truſtee in the place of *Jackſon.* The teſtator had no intention to revive theſe annuities. The confirmation of the will muſt apply alſo to the prior codicils; otherwiſe this abſurdity would follow; that *Jackſon* being removed as a truſtee in the will would remain a truſtee in thoſe codicils.

Solicitor General for the defendants Charles and Sarah Croſbie—It would formerly have been difficult to ſuſtain the point for the defendants: but upon the deciſion in the caſe of *Lord Walpole* v. *Lord Orford* (*a*), upon the will of the Earl of *Orford*, which is directly contrary to the argument for the plaintiffs, this will muſt be conſidered as republiſhed: otherwiſe that determination cannot be ſupported. In that caſe the ratification and confirmation in the codicil applied to a will, that was at the execution of the codicil a revoked inſtrument: ſo in this the annuities were revoked at the execution of the fifth codicil. It is ſaid, the teſtator intended

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(*a*) *Ante*, vol. 3. 402.

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tended no alteration except of a truſtee and executor. It was equally clear in that caſe, that nothing more was intended than to provide for that, which the teſtator had left undone by both wills, his debts and legacies, and the appointment of executors. It is ſaid, if the intention of this teſtator was to revive theſe annuities, he would have recited them, and made a diſpoſition accordingly. The ſame argument applied to that caſe. It is ſaid, if this teſtator had purchaſed a real eſtate between the execution of the fourth and fifth codicils, the fifth codicil would not have republiſhed his will ſo as to paſs that eſtate. It would have had that effect, if the will had related to real eſtate, upon the authority of *Gibſon* v. *Lord Montfort* (b): but this will relates only to perſonal eſtate, and has no words diſpoſing of real. That is a ſtrong circumſtance. The queſtion is, whether he meant by his laſt will to deſcribe his will with all the codicils. He could not have intended his fourth codicil. By that he had diſpoſed of his real eſtate purchaſed after the execution of his will. He then executes the fifth codicil without any witneſs, merely changing a truſtee, not taking notice, that he had by a codicil diſpoſed of his real eſtate, and in expreſs terms referring to the will only. That cannot alter the diſpoſition of the real eſtate by the fourth codicil; not only becauſe the fifth is not properly atteſted, but becauſe it is not expreſſed ſo as to have that effect, not applying to the diſpoſition made thereby of the real eſtate. The effect of confirming his will, to which he refers by date, not referring to any inſtrument ingrafted upon that will, muſt be to remove every thing inconſiſtent with that will; and the caſe upon Lord *Orford*'s will can be maintained only upon this ground; that, when a teſtator ratifies an inſtrument by date, though it is a revoked inſtrument, it is thereby again ſet up; and every intervening inſtrument inconſiſtent with it is revoked. Lord *Orford* never meant to ſet up the will of 1752: but that was only conjecture; and the court could not enter into it. The anſwer was, he had deſcribed the will by date; and there was ſuch an inſtrument. It was there argued, as it may be now, that if nothing more was intended than the particular object, there was no occaſion for the ratification.

Mr. Manſfield in reply—This fifth codicil has nothing to do with the fourth codicil ſpecifically; nor in any reſpect revokes it. The teſtator's will is his will with the four codicils added to it.

(b) 1 *Veſ.* 485.

The codicils are part of the will. He means to confirm his will with the additions, the whole conſtituting one will. The fifth codicil was made but two days after the fourth. There is no doubt, he meant the defendant to be completely ſubſtituted in the room of *Jackſon*. It did not occur to him as to this ſmall eſtate to have three witneſſes: but that circumſtance furniſhes no argument as to the intention.

The caſe upon Lord *Orford*'s will has no application to this. That was a queſtion as to two wills; neither of which was a ſubſiſting will until the death of the teſtator. The codicil begins by ſtating the will firſt in point of date to be his then exiſting will. By this codicil no intention appears to ſet up that part of the will as to theſe annuities, which he had expreſsly revoked. There is not the leaſt reference to the fourth codicil ſeparately; and his will comprehended all the additions.

Maſter of the Rolls—When this caſe was ſtated, I had no doubt upon it; and the *Solicitor General* has not been able to ſucceed in applying that caſe upon Lord *Orford*'s will, upon the authority of which alone he reſts, to this. I ſhall give my opinion at preſent, having very little doubt; and if upon reading that caſe I ſee any reaſon to alter that opinion, I will mention it on *Monday*.

The teſtator by his will gives two annuities to *Sarah Croſbie*. By the fourth codicil he revokes thoſe annuities. Two days after the execution of that codicil, it is ſaid (but that I lay totally out of the caſe; for I cannot ſay, two days will furniſh a preſumption, that four days or ten days would not furniſh) but two days after the execution of the fourth codicil the teſtator makes a fifth, expreſsly calling it a codicil to his will; by which he ſubſtitutes one executor for another; and then in the common way, quite unneceſſarily, he declares, that is the only point, in which he makes any alteration in the will; for that is the real meaning of thoſe words; that having altered his will in one reſpect he means to alter it in no other. The queſtion then is, whether the fourth codicil, ſo far as it is inconſiſtent with the will, is revoked in conſequence of this reference by the fifth to the will; which indeed is the caſe of every codicil; which muſt refer to ſome will, the laſt in date, if no expreſs date is mentioned; if there is, that of the particular date expreſſed. The caſe upon Lord *Orford*'s will only determines, that a codicil referring to a former will as the laſt will cancels intermediate wills. But the point contended in this caſe is, that it ſets up all the will againſt a codicil revoking it in part. That caſe will not by any means bear out that argument. It is perfectly true, that if a man ratifies and confirms his laſt will, he ratifies and confirms it with every codicil, that has been added to it. There is a great diſtinction between wills and codicils in this reſpect. If there are two ſeparate papers, both called wills, inconſiſtent with each other, it is not the rule to prove both in the Eccleſiaſtical Court. The laſt is the will. From the nature of the inſtrument it revokes the other. If the laſt purports to be the whole will, a complete, ſubſtantive, will, they do not, I conceive, prove both. Unleſs there is ſomething to ſhew, it was meant to be coupled with another inſtrument, it is not taken to be a codicil. But if it does purport to be coupled with another inſtrument, it is as much a part of that inſtrument, as if it was written upon the ſame paper. Many abſurdities would follow from the contrary conſtruction. Suppoſe the teſtator had by his will given a legacy of 200*l.*, and by a codicil had given the legatee 100*l.* inſtead of the 200*l.*, and then ſhould make another codicil, of this ſort, merely changing an executor, and ratifying and confirming his will in all other reſpects. Is the legatee to have both the 200*l.* and the 100*l.*? That muſt be contended.

The true rule upon the ſubject appears to me to be as I have ſtated. The *Solicitor General* confeſſes, that if it was not for the caſe of *Lord Walpole* v. *Lord Orford*, he ſhould ſcarcely have been able to argue it: but he thinks that caſe affords him a ſufficient ground. It differs in this eſſential point. There was no queſtion in that caſe upon a will and a codicil. The queſtion was upon two inconſiſtent wills; one made in 1752; the other in 1756. The ſecond had deſtroyed the firſt, unleſs the teſtator thought fit to revive it. By a codicil in 1776 he expreſsly declares it to be a codicil to his laſt will and teſtament, dated the 25th of *November* 1752. That was held to cancel the intermediate will. All, that the Courts of law, firſt the Court of *Common Pleas*, and afterwards the Court of *King's Bench*, determined, was, that evidence could not be admitted to prove the miſtake, and that the teſtator did not mean to refer to the will, to which the codicil did expreſsly refer. It was ſaid, that it really aroſe from the miſtake of the perſon em-

Two inconſiſtent wills: a codicil referring to the firſt by date as the laſt will cancels the intermediate will; and evidence of miſtake cannot be admitted.

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ployed to draw the codicil; who took the wrong will. Both the Courts of law were of opinion, they could not receive evidence of that; as the teſtator had ſolemnly declared, the will of 1752 was his laſt exiſting will. It would not at all affect the caſe of any codicil made as an appendix to either of his two wills. If the will had dropt, perhaps a codicil, profeſſedly a codicil to that will, would have dropped with it. That might have been a nice queſtion; whether a codicil, which in words referred only to the will of 1756, would not have fallen with that will. I will look into that caſe before *Monday;* and if I ſee any reaſon to alter my opinion, I will mention it.

Declare, that the annuities of 200*l.* and 300*l.* given by the will of *Sarah Croſbie* were and remain revoked by the fourth codicil.

The caſe was not mentioned again.

GILDART *v.* MOSS.

Rolls.
May 7, 8.

After an order for confirming the report *niſi*, filing exceptions, and making the depoſit with the Regiſter are no cauſe to prevent that order being made abſolute, unleſs an order for ſeting down the exceptions to be argued is obtained; which may be done either by the plaintiff or defendant. The order confirming the Report was diſcharged on payment of coſts.

AN order was made to confirm the Maſter's Report *niſi.* Before the eight days were elapſed, Exceptions were taken; and the depoſit paid to the Regiſter; but as no order was obtained for ſetting down the Exceptions to be argued, the other party proceeded; and made the order for confirming the Report abſolute: the Regiſter having certified, that no cauſe was ſhewn.

A motion was made to ſet aſide that order for irregularity.

Mr. Romilly in ſupport of the motion contended, that the Regiſter could not after Exceptions filed and the depoſit paid into his hands certify, that no cauſe was ſhewn; and that the plaintiff might ſet down the Exceptions for argument as well as the defendant.

Mr. Richards and Mr. Hart on the other ſide inſiſted, that nothing but an order for ſetting down the Exceptions is ſufficient cauſe againſt confirming the Report.

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Maſter of the Rolls—It reſts entirely upon the practice; whether making the depoſit and taking Exceptions are of any avail, unleſs accompanied by an order for ſetting down the Exceptions. It is clear, either party may ſet down the Exceptions. Mr. *Dickins*, the Regiſter, has certified, that no cauſe was ſhewn, though he knew, that 5 *l.* was depoſited with him, and conſequently, that Exceptions were taken. I will ſee the Regiſter, to know whether that was an omiſſion.

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Maſter of the Rolls—As to this motion, according to the practice, as it is ſtated to me, nothing but an order for ſetting down the Exceptions for argument is a ſufficient cauſe againſt making the order for confirming the Report abſolute. Filing the Exceptions and making the depoſit are nothing without that order. Either party may ſet them down; and that would be the better courſe: but the diſpute is, who ſhould be at the expence of that. Sometimes the party, againſt whom the Exceptions are taken, ſets them down; becauſe he may chooſe where to ſet them down.

This party filed Exceptions, and got the certificate from the Regiſter of having made the depoſit with him; and of that they give notice to the other parties. They notwithſtanding proceeded to make the order for confirming the Report abſolute. It is impoſible not to decide, that they are regular: but it is not a handſome proceeding. It would have been fair to have appriſed them, as it muſt have been known, that the Exceptions were taken with a view of preventing the Report from being confirmed: but I muſt determine it to have been regular; and that nothing but an order for ſetting down the Exceptions is a ſufficient cauſe for preventing the Report from being confirmed (*a*).

I ſhall diſcharge the order for confirming the Report: but the queſtion is upon what terms.

The order was diſcharged on payment of two guineas coſts.

(*a*) In *Hinde's Chancery Practice* 272, 273, the practice is laid down accordingly; and the caſe of *Hall* v. *Malliner*, *Michaelmas* Term 1782, in which the point was determined, is referred to.

JOPLING *v.* STUART.

Rolls.
May 8.

Where the bill is amended after anſwer, if the amended bill is not anſwered, the plaintiff is entitled to a decree, that the bill be taken *pro confeſſo* generally.

THE bill was filed by creditors. The defendants, the widow of the teſtator, who was his executrix, and deviſee for life of the real eſtate, and her ſon, deviſee in remainder in fee, appeared, and put in an anſwer. Afterwards the bill was amended; and *Subpœnas* were ſerved upon the defendants to anſwer the amendments: but they abſconded.

All proceſs having iſſued for want of an anſwer to the amended bill, the cauſe was ſet down for the purpoſe of having the bill taken *pro confeſſo*.

Mr. Romilly and Mr. Bell for the plaintiffs cited *Davis* v. *Davis* (*a*), *Abergavenny* v. *Abergavenny* (*b*), and *The Attorney General* v. *Young* (*c*).

The Maſter of the Rolls decreed the bill to be taken *pro confeſſo* generally (*d*).

(*a*) 2 *Atk.* 21.

(*b*) 4 *Vin.* 446. *pl.* 1. 2 *Eq. Ca. Ab.* 179. *pl.* 5.

(*c*) *Ante*, vol. 3. 209.

(*d*) *Turner* v. *Turner* in *Chancery* 12th of *March* 175—

An inſufficient anſwer is no anſwer; and therefore ſhall not prevent a decree to take the bill *pro confeſſo*.

The anſwer had been reported inſufficient in matters excepted to.

The defendant being in contempt to a ſequeſtration for want of a better anſwer, the cauſe was ſet down, and came on to have the bill taken *pro confeſſo*; when the plaintiff's Counſel ſtarted a doubt as to the propriety of taking the bill *pro confeſſo*; part of it being anſwered; according to the opinion of Lord *King* in *Hawkins* v. *Crook*, 2 *P. Wms.* 556.

Lord *Hardwicke* was decidedly of opinion, that the defendant had not obeyed the *Subpœna*; which was *to anſwer the bill*; and that an inſufficient anſwer was no anſwer.

The bill was decreed to be taken *pro confeſſo*.

Bacon v. *Griffith*, in *Chancery*, 9th and 14th of *December* 1772.

Bill amended after anſwer may be taken *pro confeſſo* generally, not as to the amendments only; the Record being entire.

The defendant having anſwered, the plaintiff amended his bill. The defendant being in contempt to a ſequeſtration for not anſwering the amendments, on the 9th of *December* 1772 Sir *Thomas Sewell* made an order for the clerk in court to attend with the Record of the bill, in order to have it taken *pro confeſſo* as to the amendments.

On the 14th of the ſame month that order was diſcharged by Lord *Apſley*; who was of opinion, that, the original bill being amended, it was one Record; and the amendments not being anſwered, the Record was not anſwered; and the application ſhould have been general, for the plaintiff's clerk in court to attend with the Record of the plaintiff's bill, in order to have the ſame taken *pro confeſſo*.

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Rolls,
May 8.

PIETY *v.* STACE.

An executor keeping the fund, and uſing it for his own benefit, contrary to his truſt, decreed to account with intereſt at 5 *per cent.* and coſts.

THE teſtator by his will gave all his perſonal eſtate, to —— *Stace* and two other perſons, whom he appointed his executors, upon truſt as ſoon as conveniently might be after his deceaſe to ſell and convert into ready money all ſuch parts of his perſonal eſtate as ſhould not conſiſt of money, and to place the ſame out in the public funds, or upon mortgages, or other good and ſufficient ſecurities, with full power to call in and again place out the ſame in ſuch manner as they ſhould think fit, and to pay the dividends and intereſt to certain perſons for their lives, and after the deceaſe of theſe perſons to diſpoſe of the capital, as therein is directed.

Stace alone, the other executors having renounced, proved the will; and a bill was filed, under which the uſual decree was made for taking the accounts; and the coſts of all parties were directed.

Nothing farther was done in that cauſe: but *Stace* poſſeſſed himſelf of the perſonal eſtate of the teſtator, and inſtead of laying it out according to the directions of the will, kept it in his own hands.

This bill was filed by a co-plaintiff in the other cauſe, claiming under the will, in order to have the decree carried into execution, and an account againſt the defendant, with intereſt at the rate of 5 *per cent.* upon the balances in his hands.

It appeared upon the anſwer, that the defendant had called in part of the teſtator's property, that was out upon ſecurity; that he had uſed the property generally in his trade, and in various tranſactions in the public funds, paying only the dividends of the ſtock to the perſons entitled under the will for life; and that he had lent part to his ſon upon the ſame terms.

Mr. Lloyd and Mr. Harvey for the plaintiffs—In *Treves* v. *Townſhend* (*a*), upon an appeal from the decree of the Lords Commiſſioners, charging the defendant with intereſt at 5 *per cent.* upon money in his hands as aſſignee of a bankrupt, which had

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(*a*) 1 *Bro. C. C.* 384. *Newton* v. *Bennet*, *Perkins* v. *Baynton*, 1 *Bro. C. C.* 359 375.

1799.

PIETY *v.* STACE.

been employed in his trade, Lord *Thurlow* offered him an enquiry, whether 5 *per cent.* would be made in that trade; and, that being declined, the decree was affirmed. The defendant there alledged, that he had kept the money at his bankers (*a*).

As to the coſts, in *Seers* v. *Hind* (*b*) the executor was decreed to pay coſts; upon the ground, that, conceiving he was not liable to pay legacies before the end of a year after the teſtator's death, he paid them, and took a diſcount for his own uſe. Lord *Thurlow* there ſays, that, when the Court is obliged to give intereſt againſt executors as a remedy for a breach of truſt, coſts againſt them muſt follow of courſe.

In this caſe the executor choſe to ſpeculate with the property in the funds.

Mr. Graham and Mr. Sutton for the defendant—The teſtator meant only, that the fund ſhould be well ſecured; and for any thing, that appears to the contrary, he was ſatisfied with the perſonal ſecurity of the executors. By the will they were to place out the property in ſuch manner as they ſhould think fit. It turns out, that the defendant has played with the money with ſafety. The eſtate has not loſt one farthing. The plaintiffs cannot be entitled both to intereſt and the benefit ariſing from what the defendant has done.

As to the coſts, the decree in the other cauſe cannot be varied. The defendant is therefore entitled to the coſts up to the account under that decree. In *Seers* v. *Hind* the conduct of the executor was not only a groſs breach of truſt, but a fraud upon the property he was bound to protect; upon a principle, from which the Court never recedes, that a truſtee ſhall never make a profit of the truſt fund.

Mr. Lloyd in reply was ſtopped by the Court.

Maſter of the Rolls—This caſe is under very extraordinary circumſtances; which ought to prevent the Court from giving coſts at the time of the hearing in future; for it is contended on behalf

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(*a*) *Ante*, vol. 1. 92.

(*b*) *Ante*, vol. 1. 294.

of this executor, who by the refuſal of the two others appointed with him became ſole executor, that there is no breach of truſt in him; to whom this truſt was committed; that he ſhould as ſoon as conveniently might be after the teſtator's deceaſe ſell and convert into ready money all ſuch parts of the perſonal eſtate as ſhould not conſiſt of money, and place the ſame out in the public funds, or upon mortgages, or other good and ſufficient ſecurities; with full power, and, I admit, an implicit confidence in the executors, to call in and again place out the ſame in ſuch manner as they think fit. The manner, in which this defendant has thought fit to execute this truſt, is by ſelling out good ſecurities, not putting the money out upon any other ſecurity, but keeping it himſelf. It is as groſs a breach of truſt as any, that can be imagined, except ſpending the money, and not being able to repay it; which if a failure had happened, would have been the conſequence. What has been contended is perfectly fallacious. If I do not charge him with intereſt, I ſhall give him a benefit. He ſells out ſtock and buys it again at a leſs price. Suppoſe, he had failed; who would have ſuſtained the loſs? Was it done for any benefit to the *Ceſtui que truſts?* He ſays fairly, his object was to pay the dividends to the perſons entitled for life, and to uſe the ſurplus himſelf. He would have the advantage of having the money in his pocket without paying intereſt for it; and it would be a temptation to truſtees to ſpeculate with the property, upon the ground, that the Court of Chancery will only make them pay the difference, and they will have the intereſt in the mean time. This caſe is worſe from the confidence placed in this executor. I do not ſee the difference between this and a truſtee lending truſt-money, taking 4 *per cent.* for the truſt and 1 *per cent.* for his own pocket. There is no doubt, he might have got 5 *per cent.* upon perſonal ſecurity.

Executor acting with regard to the teſtator's property in any other manner than the truſt requires is anſwerable to the *ceſtui que truſt* for any gain, and is liable for any loſs.

The rules are now ſo well underſtood, that it is waſte of time to repeat them. An executor, if he will take upon himſelf to act with regard to the teſtator's property in any other manner than his truſt requires, puts himſelf in this ſituation; that he cannot poſſibly be a gainer by it: any gain muſt be for the benefit of his *Ceſtui que truſt*; and if there is any loſs upon the capital, as if the ſtocks riſe ever ſo much, he muſt replace it; in order that the *Ceſtui que truſt* may ſuſtain no damage from his conduct. Every farthing, more than the dividends, that lay in his hands, is juſt ſo much gain to himſelf. For every ſhilling he got by any of theſe tranſactions he ſhall pay intereſt at the rate of 5 *per cent.* for every minute it lay in his hands. As to what he lent to his ſon, paying only the dividends of the ſtock, he ought to have lent it at 5 *per cent.* What buſineſs had he to lend it to his ſon upon ſuch terms? There is a breach of truſt in that reſpect. He muſt therefore pay 5 *per cent.* upon the whole. I ſuppoſe, he imagined, he might make an advantage to himſelf, if he could do ſo without any diſadvantage to the *Ceſtuis que truſt*; which is the notion of truſtees: but he muſt pay for that.

With reſpect to the coſts I am not diſpoſed to undo what has been done already. This co-plaintiff was very negligent. If it had not been for that, the defendant would not have had it in his power to traffic with the property. I ſhall therefore leave the coſts of the other cauſe down to the hearing, as they were. But as to the coſts of this cauſe, the defendant muſt pay them.

Direct an account of all the defendant has made; with intereſt at the rate of 5 *per cent.* upon the balances in his hands; and let him pay the plaintiffs the coſts of this ſuit.

WARD *v.* BAUGH.

Rolls.
May 8, 9.

Teſtator made a proviſion for his wife; and gave a ſum of money in truſt for the ſeparate uſe of a daughter, and after her death to divide the principal equally between her children and their iſſue at twenty-one; if none ſuch, to his ſon, whom he made reſiduary legatee. Then after ſimilar, but unequal proviſions for his other children he declared, that the proviſion in the will for his ſaid wife and their ſaid children was in ſatisfaction of all right, claim, *&c.* which ſhe, or they, or any or either of them, could ſet up, *&c*, or which ſhe and they would be entitled to under his marriage articles; and if his ſaid wife and children or either of them ſhould refuſe, *&c*, he revoked the legacy and bequeſt therein contained to the uſe and benefit of ſuch one or more of them his ſaid wife and children, who ſhould refuſe or decline to execute ſuch releaſe or diſcharge, and declared the ſame void as to ſuch one or more of them, who ſhould ſo refuſe, as though he had died inteſtate. A child electing to take under the articles forfeits the life-intereſt; which falls into the reſidue: but the children of ſuch child are not bound by the election; and liberty was given to apply on the death of the parent.

By articles, dated the 31ſt of *July* 1760, previous to the marriage of *Lancelot Cowper* and *Ann Biſſe*, *Lancelot Cowper* in conſideration of the marriage and a portion of 2000 *l.* covenanted with the truſtees, that if *Ann Biſſe* ſhould die in his life-time, leaving iſſue one or more child or children by him, then his heirs, executors, or adminiſtrators, ſhould in ſix calendar months after his death pay to the ſaid truſtees, their executors, adminiſtrators, or aſſigns, 2000 *l.* with intereſt at 4 *per cent. per annum* from his death, upon truſt, if there ſhould be but one child, for ſuch child;

and if there ſhould be more than one child, in truſt for all of them, equally to be divided, payable to a ſon or ſons at the age of twenty-one, and to a daughter or daughters at that age or day of marriage, which ſhould firſt happen; provided it ſhould happen after the death of *Lancelot Cowper*: but if ſuch ſon or ſons ſhould be twenty-one, or daughter or daughters of that age, or be married, in the life-time of *Lancelot Cowper*, then the ſhares of ſuch children to be paid within ſix calendar months after his death; with a clauſe, that in caſe any child ſhould die a minor, or before their portions become payable, the ſame ſhould go to the ſurvivors; and in caſe *Lancelot Cowper* ſhould die in the life-time of *Ann Biſſe*, then the heirs, executors, or adminiſtrators, of *Lancelot Cowper* ſhould within ſix calendar months after his death pay to the ſaid truſtees, their executors or adminiſtrators, 4000 *l.* with intereſt, as aforeſaid, upon truſt to place the ſame out at intereſt in the public funds or government or real ſecurities, with the conſent of *Ann Biſſe* during her life, and to permit her or her aſſigns to receive the intereſt, dividends, and proceeds, thereof to her own uſe during her life; and immediately after her deceaſe, in caſe there ſhould be iſſue one or more child or children of her body by the ſaid *Lancelot Cowper* begotten, in truſt to call in the ſaid 4000 *l.*, and to pay the ſame to ſuch child or children at ſuch times, and in ſuch ſhares, proportions, and manner, as before expreſſed; provided ſuch times of payment ſhould happen after the deceaſe of *Ann Biſſe*; or elſe, immediately after her deceaſe; with directions as to the application of the intereſt during the minority of the children.

The iſſue of this marriage was three children; *Margaret*, the wife of *John Ward*, *Ann Wade*, and *John Cowper*. *Margaret Ward* attained the age of twenty-one before her marriage.

Lancelot Cowper died in 1794; leaving his widow and children ſurviving. By his will, dated the 1ſt of *July* 1794, he gave the intereſt of 1000 *l.* to his wife *Ann* for her life; and he gave her power to divide the principal money among his children; and he made other proviſions for his wife to a conſiderable amount.

The teſtator then gave to his executors and truſtees the farther ſum of 1400 *l.*, upon truſt to place the ſame out at intereſt, and to pay the intereſt into the proper hands of his daughter *Margaret Ward*;

Ward; her receipt alone to be a diſcharge; and on her death to divide the principal equally between her children and their iſſue at twenty-one; if none ſuch, to his ſon *John Cowper*; whom he made his general reſiduary legatee; and he made ſimilar, but unequal, proviſions for his children *Ann Wade* and *John Cowper*. Then reciting his marriage articles the teſtator declared, his will and meaning was, that the proviſion in and by that, his ſaid will, made for his ſaid wife and their ſaid children was intended by him, and was to be conſidered by them, in lieu and full recompence, ſatisfaction, and diſcharge, of all right, claim, and intereſt, which ſhe or they or any or either of them could, ſhould, or might, ſet up or demand upon or againſt his eſtate or effects, or againſt his executor, for or in reſpect of the ſaid ſums of money, which in either of the events aforeſaid would become payable, and which ſhe and they would be entitled to, out of his ſaid eſtate and effects, by virtue of and under the ſaid articles of agreement and every part thereof; and that if his ſaid wife and children, or either of them, ſhould upon requeſt to them for that purpoſe by his executors or the ſurvivors or ſurvivor of them, his executors, &c, decline or refuſe to accept of the proviſion hereby made for them, and to diſcharge the ſaid eſtate and effects, and his ſaid executors, and alſo the ſaid truſtees in the ſaid articles of agreement, from the payment of the monies in and by the ſaid articles of agreement covenanted to be paid, then the teſtator did revoke and make void the legacy and bequeſt therein contained to the uſe and benefit of ſuch one or more of them his ſaid wife and children, who ſhould refuſe or decline to execute ſuch releaſe or diſcharge; and did thereby declare the ſame to be from thenceforth null and void as to ſuch one or more of them, who ſhould ſo refuſe, as fully and abſolutely as though he had died in a ſtate of inteſtacy.

The bill was filed by *John Ward* and *Margaret*, his wife; praying, that the executors of the teſtator may be decreed to raiſe and pay to the plaintiff out of the aſſets the ſum of 1333 *l.* 6 *s.* 8 *d.*, her ſhare of the 4000 *l.* mentioned in the articles, in caſe *Ann Cowper*, the plaintiff's mother, ſhall elect to take under the will, with intereſt from the time of her election: or otherwiſe, in caſe ſhe hath elected or ſhall elect to take under the articles, then that the ſaid ſum of 1333 *l.* 6 *s.* 8 *d.* may be paid into the bank, &c. ſubject to farther order, and upon the truſts of the articles.

The cauſe came on in *Hilary* term; when a doubt was ſuggeſted by the Maſter of the Rolls, whether, though the plaintiff Mrs. *Ward* ſhould elect to take under the articles, her children would be bound by her election, or whether they might not hereafter claim the bequeſts under the will; and in the ſame manner, whether the children of *Ann Wade* and *John Cowper* would be bound by the election of their reſpective parents.

Upon this the cauſe was ordered to ſtand over; and *Alfred Ward*, the ſon of the plaintiffs, *Lancelot Cowper Wade*, the ſon of *Ann Wade*, and *Ann Biſſe Cowper*, the daughter of *John Cowper*, all infants, were made parties.

When the cauſe came on again, the teſtator's widow having elected to take under his will, the plaintiff Mrs. *Ward* attended in court to conſent, that her ſhare of the 4000 *l.* under the articles ſhould be paid to her huſband.

Mr. Lloyd for the plaintiffs contended, that under this will no right of election remained to the children.

Mr. Graham and Mr. Hubberſty for the infant children—The plaintiff cannot by her election defeat the intereſt of her child; which is a clear veſted intereſt. The will gives, beyond the eſtate for life to the plaintiff, a clear veſted intereſt to her children, and to the iſſue of thoſe children. All, that was intended for the plaintiff, was the intereſt for life. It is fair to preſume, the object of the teſtator was to give her a life-intereſt in a ſum nearly equal to that under the articles, and to give the abſolute intereſt to her iſſue. There is a gift over, in caſe there ſhould be no children. The clauſe of revocation can only be conſtrued to extend to ſuch one or more of them, his ſaid wife and children, who ſhould refuſe to abide by the will. The election of the plaintiff therefore will only make void her life-intereſt under the will; which will make part of the reſidue; and after her deceaſe her children will have a right to claim the capital of 1400 *l.* It cannot be ſuppoſed, the teſtator intended, her election ſhould prejudice them. This is not within the principle of the caſes of election.

Maſter of the Rolls—The queſtion is, what the teſtator meant by the words "*The legacy and bequeſt,*" *&c.*; whether he did not mean what was given to his daughter and her children. I have ſome doubt upon the point; but am rather inclined to think, the mother's election will defeat the intereſt of the child. Then he has purchaſed her intereſt; which muſt go to his perſonal eſtate, to indemnify ſo far thoſe entitled to it againſt any loſs they may ſuſtain by the election. Lord Chief Juſtice *De Grey* ſtated that very clearly (a); that the eſtate, which has loſt by that election, ſhall be indemnified by the intereſt the party electing would have taken. This plaintiff gives up her intereſt under the will; and the teſtator's eſtate is to have the benefit of it. But I cannot finally determine this point now.

May 9.

Maſter of the Rolls—Upon reading this will I have no doubt, that the children are not bound by the election of the parent. It would be too much to exclude them. It cannot poſſibly be contended, that this is a mere ſubſtitution for the proviſion made for the children of the marriage; for the teſtator has given unequal portions. It is not divided equally. The queſtion then is merely, whether theſe general words ſhould exclude the children. I am clearly of opinion, they are not bound; and therefore ſhall give them liberty to apply.

Declare, that the intereſt of the ſum of 1400 *l.* under the will during the life of *Margaret Ward* is part of the reſidue of the teſtator's perſonal eſtate; with liberty for any perſon to apply after her death.

PEARSON *v.* BELCHIER.

Rolls,
May 9.

Bill for an account of the produce of the captures by the *Royal Family Privateers* of *Briſtol* diſmiſſed on the ground of laches: the original bill having been filed in 1749: but the length of time cannot be pleaded in bar.

PREVIOUSLY to the year 1746 ſeveral private ſhips of war, under the general title of *The Royal Family Privateers*, were fitted out at *Briſtol* for the purpoſe of cruiſing againſt *France* and *Spain*; and articles were executed between the owners, officers, and crews. The adventure proved very ſucceſsful: the value of the captures amounting to above a million *ſterling*.

(a) See *The Earl of Darlington* v. *Pulteney*, *ante*, vol 2. 544. vol. 3. 384. See alſo upon the doctrine of election *Blake* v. *Bunbury*, *Finch* v. *Finch*, *ante*, vol. 1. 514 534. *Wright* v. *Rutter*, *Rutter* v. *Maclean*, *ante*, vol. 2. 673. vol. 4. p. 531.

In 1749 the original bill was filed by *Robert Sinclair* and *John Wilkinſon*, on behalf of themſelves and the other officers, ſeamen, &c, of the ſaid ſhips, againſt *Edward Ironſide* and *William Belchier*, the principal managers, and other perſons; praying an account of the prizes, and a diſtribution of the produce according to the articles.

That cauſe was heard at the *Rolls*; and in *February* 1752, the plaintiff *John Wilkinſon* being then dead, an account was decreed againſt all the defendants, except three; as to whom the bill was diſmiſſed.

In *January* 1781, an original bill in nature of a bill of revivor was filed by *Thomas Wilkinſon*, heir-at-law and adminiſtrator of *John Wilkinſon*, and by *Richard Wolfe* and *James Wallace*, againſt the ſurviving defendants, and the repreſentatives of thoſe deceaſed; ſtating, that ſince the decree the defendants, particularly *Belchier* and *Ironſide*, had thrown many obſtacles in the way of the plaintiffs and the other claimants; that the property continued in the hands of the managers; and the claimants from their unſettled ſtate as mariners were unable to carry on the accounts directed by the decree.

To that bill a plea and anſwer were put in on the 27th of *March* 1782, pleading in bar the decree pronounced in 1752; and that no proceedings where had thereon; and ſtating, that ſeveral defendants, and their ſolicitors, and the immediate repreſentatives of ſeveral parties, had died ſince the decree; and no bill of revivor was filed until the 23d of *January* 1781.

The plea was argued before Lord *Thurlow*; and on the 30th of *July* 1782 his Lordſhip ordered the plea to ſtand for an anſwer, with liberty to except.

Some of the defendants put in anſwers: others died without having anſwered. *John Belchier*, a defendant to the original bill in nature of a bill of revivor, died in 1785 without having put in anſwer; leaving *William Belchier*, his executor and heir-at-law. Some exceptions were taken, which were not proſecuted; and no farther proceedings took place till 1786; when another bill was filed by *Jane Wilkinſon*, widow and adminiſtratrix of *Thomas Wilkinſon*, and adminiſtratrix *de bonis non* of *John Wilkinſon*. The plaintiff was afterwards admitted to ſue *in formâ pauperis*. In 1787 the bill was amended by *Jane Pearſon*, the daughter and executrix of *Thomas Wilkinſon*, and alſo adminiſtratrix *de bonis non* of *John Wilkinſon*, *Richard Wolfe*, and *James Wallace*. The ſuit was afterwards revived upon ſeveral ſubſequent abatements. The laſt bill of revivor was filed in *June* 1791.

When the cauſe came on, the defendants were the derivative perſonal repreſentatives, heirs at law, deviſees, and legatees, of the original defendants; two ſolicitors, who had been employed by *William Belchier*; and the Bank of *England*; the *South-Sea* Company; The *Royal Exchange* Aſſurance; and the *Eaſt India* Company.

The bill contained a variety of charges, with a view to eſtabliſh, that the produce of the captures were poſſeſſed by the repreſentatives of the original defendants; that diſpoſitions of the property had been made for the purpoſe of eluding inquiry; and that the original defendants clandeſtinely paid *Robert Sinclair*, a conſiderable ſum of money to put an end to all farther proceedings; from a belief, that no other of the claimants would be able to proſecute the cauſe; and that *Sinclair* continued to receive an annuity in recompence of his having forborn to proceed farther in the ſuit.

Theſe charges were not ſupported by evidence; and were denied by the anſwers.

The defendants did not admit any receipts by the perſons they repreſented: but they relied on the length of time, as affording a preſumption of ſatisfaction. The anſwers alſo ſtated, that the aſſets were diſtributed; advertiſements having been publiſhed for creditors.

Mr. Graham for the plaintiffs ſtated the caſe; and in palliation of the delay alledged the poverty of the plaintiffs, and their ſituation as ſea-faring people in an unſettled way of life.

The Counſel for the defendants were not called on by the Court.

Maſter of the Rolls—I am extremely ſorry for theſe poor people: but it is impoſſible to entertain this bill. Length of time cannot be pleaded in bar in the Court of *Chancery*: but I adhere to the principles, which are fully detailed in *Hercy* v. *Dinwoody* (*a*), *Lord Deloraine* v. *Browne* (*b*), and *Smith* v. *Clay* (*c*). Under theſe circumſtances therefore the bill muſt be diſmiſſed.

A pauper is liable to be committed for filing an improper bill.

I very much diſapprove of this bill in making ſeveral of theſe defendants parties. The original plaintiffs were not paupers: but the plaintiff now before the Court is a pauper. I ſhould have diſmiſſed the bill with coſts, if it was not for that circumſtance. A pauper is liable to be committed for filing an improper bill (*d*): otherwiſe they might be guilty of great oppreſſion.

The defendants did not preſs for any order againſt the plaintiff on that ground.

(*a*) *Ante*, vol. 2. 87. (*b*) 3 *Bro. C. C.* 633. (*c*) *Amb.* 645. 3 *Bro. C. C.* 639. *n.*
(*d*) *Ex parte Shaw*, *ante*, vol. 2. 40.

Rolls.
May 9.

WHOPHAM *v.* WINGFIELD.

Bill by a legatee, very nearly of age, to ſecure the legacy: the coſts were given out of the eſtate: but that will not be done in future upon a bill to ſecure the legacy of an infant; as under the Legacy *Act* 36 *Geo.* 3. *c.* 52. § 32. the executor may pay the legacy into court; and the legatee, when of age, may petition for it.

THIS bill was filed againſt an executor by a legatee of 200*l.* with her huſband, to have the legacy ſecured. The legatee was ſtill an infant: but ſhe wanted only a few months of the age of twenty-one.

The executor admitting aſſets, the uſual decree was made, that the legacy ſhould be paid into Court, with coſts out of the teſtator's eſtate.

Mr. Cox for the reſiduary legatee complained, that it was a hardſhip upon him to give coſts out of the eſtate in ſuch a caſe as this; as, if the plaintiffs would have waited a few months, they might have received the legacy without the neceſſity of a bill.

Maſter of the Rolls—I muſt give the coſts out of the teſtator's eſtate. If a teſtator wiſhes to prevent the coſts of ſuch bill from falling upon his eſtate, he ought to give the legacy to a truſtee for the infant.

For the future however I ſhall not give the coſts in ſuch a caſe; for ſince the late *Legacy Act* (*a*) the executor has nothing to do but under that act to pay the legacy into court; and then he has done; and the infant, when of age, may petition for it. That ought to be known; as it will ſave great expence; and prevent the hardſhip to reſiduary legatees. Before that *Act* an infant legatee was obliged to file a bill againſt the executor; and he could not ſafely pay the legacy without a decree.

I ſhall therefore direct the coſts to be paid out of the eſtate in this caſe: but I deſire it to be obſerved, that I ſhall not do ſo in future.

(*a*) 36 *Geo.* 3. *c.* 52. *ſ.* 32.

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May 9. 11.

A. having both a power and an intereſt, the eſtate being conveyed to ſuch uſes as he ſhould appoint, and in default of appointment, to him in fee, conveys by leaſe and releaſe, uſing alſo words of appointment: the deed operates as a conveyance of his intereſt, not as an execution of his power; eſpecially if the effect of the latter conſtruction will defeat the object.

Power to revoke uſes, ſubſtituting other eſtates: *Quære*, whether a ſubſtitution of equitable for legal eſtates, though a bad execution at law, is ſufficient in equity; as where it is done by appointing under a power, and declaring uſes upon the appointment; which are conſequently mere truſts.

Purchaſer juſtified in taking a fair objection, though overruled.

Intereſt given at 4½ *per cent.*

By indentures of leaſe and releaſe, dated the 24th and 25th of *June* 1777, previous to the marriage of *Thomas* and *Elizabeth Cox*, two houſes in *Wiſbeach* were conveyed to four perſons and their heirs, to hold the ſame unto them, their heirs and aſſigns, upon the ſeveral uſes and truſts after declared: that is to ſay, after the marriage to the uſe of *Thomas Cox* and his aſſigns for the term of his life; remainder to the ſaid truſtees to preſerve contingent remainders; remainder to the uſe of the ſaid *Elizabeth* for life, for her jointure, and in bar of dower; and after the death of the ſurvivor to the uſe of their children according to their appointment, and for want of appointment, equally, as tenants in common, in tail: if but one, to the uſe of that one, and the heirs of his or her body; and in default of ſuch iſſue, to the uſe of *Thomas Cox*, his heirs and aſſigns for ever.

The indenture contained a proviſo, that it ſhould be lawful for *Thomas Cox* and his wife *Elizabeth* during their joint lives by any writing or writings under their hands and ſeals, atteſted by two or more credible witneſſes, and by and with the conſent and approbation of the ſaid truſtees or the ſurvivor of them, teſtified, as therein mentioned, to revoke the uſes, eſtates, limitations, and agreements, therein limited or declared concerning the ſaid premiſes, and to limit, declare, and appoint, any new or other uſes or eſtates concerning the premiſes, whereof the uſes ſhould be revoked, or any part thereof; ſo that at or before the time of ſuch revocation the ſaid *Thomas Cox* and his wife ſhould with ſuch conſent and approbation, as aforeſaid, convey and aſſure other lands, tenements, and hereditaments, of an eſtate of inheritance in fee-ſimple, in poſſeſſion and not in reverſion, being freehold, or copyhold ſubject to a fine certain and not arbitrary, in ſome convenient place or places in *England*, of equal or better value than the meſſuages, lands, or hereditaments, the uſes whereof ſhould be ſo revoked, and in lieu thereof, upon ſuch and the like proviſoes, limitations, and agreements, as the premiſes, the uſes whereof ſhould be revoked, were thereby limited, or as near thereto as might be.

By indentures of leaſe and releaſe, dated the 11th and 12th of *October* 1784, a capital meſſuage and other premiſes in *Wiſbeach* were conveyed to *Robert Freeman* (one of the truſtees in the marriage ſettlement of *Thomas Cox*) and his heirs, to hold to him and his heirs to the uſe of ſuch perſon or perſons, and for ſuch eſtate or eſtates, intereſt or intereſts, and with, under, and ſubject to, ſuch powers, proviſoes, and agreements, as *Thomas Cox* ſhould by deed or writing under his hand and ſeal limit, declare, or appoint; and, in default thereof, to the uſe of the ſaid *Thomas Cox*, his heirs and aſſigns.

In 1792 *Thomas Cox* entered into a contract to ſell the eſtates compriſed in the ſettlement of 1777.

By indentures of leaſe and releaſe, dated the 19th and 20th of *Auguſt* 1792, *Thomas Cox* in purſuance of all powers in him veſted did with the conſent and approbation of the ſurviving truſtees in the marriage ſettlement grant, bargain, ſell, alien, remiſe, releaſe, and confirm, limit, declare, and appoint, and the ſaid *Thomas Cox* and his wife did with the like conſent and approbation convey and aſſure, to the ſaid ſurviving truſtees and their heirs and aſſigns the ſaid capital meſſuage and part of the other premiſes compriſed in the indenture of *October* 1784, to hold to them, their heirs and aſſigns, to and for the ſame uſes, truſts, intents, and purpoſes, and ſubject to the ſame powers, proviſoes, limitations, and agreements, as were limited, declared, and expreſſed, in and by the ſaid indenture dated, the 25th of *June* 1777.

By indentures of leaſe and releaſe, dated the 19th and 20th of *Auguſt* 1793, *Thomas Cox* did with the like conſent, as aforeſaid, grant, bargain, ſell, alien, remiſe, releaſe, and confirm, and *Thomas Cox* and his wife did convey and aſſure, unto the ſaid ſurviving truſtees and their heirs and aſſigns a piece of ground and other premiſes in *Wiſbeach*, to hold to and for the ſame uſes, truſts, intents, and purpoſes, and ſubject to the ſame powers, proviſoes, limitations and agreements, as were limited, declared, and expreſſed, by the indenture of *June* 1777.

By indentures of leaſe and releaſe, dated the 21ſt and 22d of *Auguſt* 1793 *Thomas Cox* and his wife revoked the uſes of the marriage ſettlement.

Some doubts having been thrown upon the title, with reſpect to the value of the ſubſtituted eſtates, and alſo upon the ſuppoſition, that the indenture of *Auguſt* 1792 was intended to operate as an execution of a power, and therefore it was doubtful, whether the legal eſtate did not veſt in the truſtees, in which caſe the uſes declared thereon would be void at law, and would be good only as truſts in equity, the purchaſer declined to complete the contract; upon which the bill was filed againſt him for a ſpecific performance; and the uſual decree was made, referring it to the Maſter to inquire, whether a good title could be made.

The Maſter in his Report ſet forth all the deeds; and he found, that the ſubſtituted eſtates were in *Auguſt* 1793 of greater value than the eſtates compriſed in the marriage ſettlement; and that the plaintiff could make a good title to the eſtates compriſed in the agreement.

Exceptions were taken to this Report; which were argued with a view to the coſts: but the defendant had been a conſiderable time in poſſeſſion under the agreement.

Mr. Graham and Mr. Thomſon in ſupport of the Exceptions—By the original ſettlement the legal eſtate was clearly veſted in the parties beneficially intereſted under that ſettlement; and the truſtees had

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had no legal eſtate. The queſtion is, whether the conveyance of the ſubſtituted eſtates does not vary eſſentially in limiting the uſes from the uſes limited by the original ſettlement. The plaintiff in the ſame inſtrument uſes words applying to the conveyance of an eſtate in fee-ſimple, and alſo to the execution of a power of appointment. Such an union in the ſame conveyance is very unapt and improper: but the inſtrument, though inaccurate, amounts to a complete execution of the power. Then the other words, importing the conveyance of an intereſt, are completely inoperative. Conſidering it then as the execution of a power, the neceſſary effect of it is to veſt the legal eſtate in the truſtees (*a*); and then the objection ariſes: the eſtates of the perſons beneficially intereſted being merely equitable; in which reſpect there is a material deviation from the ſettlement; which veſted the legal eſtate in the perſons beneficially intereſted.

Mr. Grant and Mr. Romilly for the plaintiff—The only queſtion is, whether this inſtrument operates as a conveyance by leaſe and releaſe or as the execution of a power? The whole objection reſts upon this; that it muſt operate as the latter: but where a man has an intereſt and alſo a power, and does an act, which may be either a conveyance of the intereſt or the execution of a power, it ſhall be referred to his intereſt, and not to his power. *Sir Edward Clere's caſe* (*b*) is an authority expreſsly to that point. This is a conveyance to the uſes of the marriage ſettlement; and that conveys the legal eſtate to the *Ceſtuy que uſe*. The inſtrument is certainly more proper for the conveyance of an intereſt than for the execution of a power. The words of appointment are thrown in generally by the Conveyancer; and are quite ſuperfluous. The party had no intention of executing the power. The Court always makes the deed operate according to the intention, if by law it may. The intention is declared to be to veſt the eſtate in the truſtees to the uſes of the marriage ſettlement. There is no room therefore for the preſumption, that the intention was merely to execute the power, not to convey an intereſt. That preſumption is in oppoſition to the deed; which goes on to declare, that the eſtate veſted in them, and was to enure, to the uſes of the ſettlement. It does not begin with words of appointment, but with thoſe

importing

(*a*) See the nature and operation of ſuch powers clearly explained in Mr. *Butler's* note, *Co. Lit.* 271. *b.* III. 4.

(*b*) 6 *Co.* 17.

importing conveyance. The order, in which the words appear, concurs with the form of the inſtrument to ſhew, that the firſt words in order are intended to be the operative words. He throws in words of appointment, if neceſſary; meaning to make uſe of all the powers, that were in him. The deed does not recite the power particularly; but is in purſuance of all powers. There is conſiderable doubt, whether the power was not merged in the intereſt he had, upon the authority of the late caſe of *Goodill* v. *Brigham* (a).

But if the legal eſtate was veſted in the truſtees, yet the proviſo in the ſettlement was ſubſtantially complied with; for the eſtates were in equity in the perſons entitled under the ſettlement; and they could come here for the legal eſtate, whenever they thought fit.

Mr. Graham in reply—Sir Edward Clere's caſe is not applicable; for there was no reference to the power: the intention was clearly to deviſe: but it is impoſſible to read this deed without ſeeing, that the plaintiff meant to execute his power. How does it appear, that he intended only to convey an intereſt. The effective words are the words of appointment. There could be no meaning in the wife's joining, except to execute the power in the marriage ſettlement: but there is alſo a plain intention to execute the power in the deed of *October* 1784, which was confined to him; and as to which her execution was nugatory. An execution of both powers was evidently intended.

May 11.

Maſter of the Rolls—I have conſidered this caſe ſufficiently to enable me to decide upon the point of the Exceptions: but ſome facts are to be aſcertained, which do not appear ſufficiently upon the bill and anſwer to enable me to determine as to the coſts. Unleſs facts of the ſort I allude to come out, I ſhould order the contract to be performed without coſts on either ſide.

Upon theſe exceptions the queſtion is now reduced to this objection in point of conveyancing; for no objection is made to the principal title to the ſubſtituted eſtates; and it now appears, the defendant is ſatisfied, or at leaſt ſees no good ground to oppoſe the

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(a) *Boſanquet and Puller's Reports* 192.

Report, as to the value of the ſubſtituted eſtates. By the marriage ſettlement there is no legal eſtate in the truſtees. Nothing is more clear than that in order for the plaintiff to avail himſelf of the power given by that ſettlement it muſt be ſtrictly complied with. On the one ſide it is contended, that it has been complied with: on the other, that it has not. I ſhall not trouble myſelf with the eſtate afterwards purchaſed, in order to make up ſufficient for the ſubſtitution. I will ſuppoſe the whole title to be under the deed of *October* 1784. The plaintiff having entered into this contract has conveyed the ſubſtituted eſtates by theſe deeds of leaſe and releaſe, dated the 19th and 20th of *Auguſt* 1792 in purſuance of all powers in him veſted, and containing words both of conveyance and of appointment. This was preparatory to the revocation of the uſes of the ſettlement, and to enable the plaintiff and his wife to revoke them under the power. The queſtion is, whether under this deed there is a good execution of the condition in the proviſo; or, in other words, whether by the deeds the plaintiff had legally conveyed to the truſtees in the ſettlement this other eſtate exactly in the ſame manner and to the ſame uſes as the eſtates compriſed in the ſettlement. The objection is entirely technical, and certainly very nice, and, I rather think, a little too refined; though an objection of that ſort certainly may fairly be made; and I will not find fault with a purchaſer for taking the opinion of the Court upon it, if gentlemen of great character really ſtate it as a fair ground of objection. The objection ariſes from the mode, in which the eſtate ſubſtituted was conveyed to the plaintiff; which was, to the uſe of ſuch perſon or perſons, and for ſuch eſtate or eſtates, intereſt or intereſts, and with, under, and ſubject to, ſuch powers, proviſoes and agreements, as he ſhould by deed or writing under his hand and ſeal limit, declare, or appoint; and, in default thereof, to the uſe of him, his heirs and aſſigns. This therefore was veſted in him (*a*) at the time of the ſubſtitution; and the mode, which he takes for that purpoſe, is, not by expreſsly declaring, that in purſuance of his power he appoints, but by this conveyance of leaſe and releaſe; in which he uſes words, that cannot at all apply to the power; and, as he had both a power and an intereſt, it is now ſaid, to invalidate the deed, the Court muſt ſay, he did this in execution of his power only, and not to convey his

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(*a*) *Ante*, vol. 3. 661. *Smith* v. *Lord Camelford*, *ante*, vol. 2. 698. *Doe* v. *Martin*, 4. *Term Rep*. 39. *Cunningham* v. *Moody*, 1 *Veſ*. 174.

intereſt; that it muſt be referred only to the power; though the truſtees are in poſſeſſion by virtue of the leaſe; which was perfectly nugatory, if he meant only to execute his power. That is going out of the way to raiſe objections, which the Court is in the habit of very much diſcouraging. I will not determine, whether it would not have been a fatal objection, if it had been an execution of the power, veſting a truſt eſtate inſtead of the legal eſtate under the ſettlement. Unqueſtionably it would be ſo at law.

I ſhall not enter into the queſtion, whether upon the caſe of *Goodill* v. *Brigham* the power could not have been exerciſed. I think notwithſtanding that caſe he might have appointed a uſe under the power; for I do not conceive, the Judges meant to decide, that, where there is a conveyance to ſuch uſes as a man ſhall appoint, and in default of appointment, to his own right heirs, the party may not under the power create an eſtate, that will ſuperſede the eſtate in fee; though perhaps, not to bar dower. If that caſe is taken in the full extent, it is very doubtful, and would ſet aſide half the conveyances in the kingdom, and I deſire it to be underſtood, that is not my opinion (*a*). But I do not by any means go upon that ground. I will ſuppoſe he had the power: but he alſo had an intereſt. The very reſpectable opinions, upon which this objection has been taken, only ſtate it as a doubt; and they are oppoſed by the opinion of another gentleman in favour of the title. But I muſt determine upon the caſe, as it appears upon conſideration of the conveyance; and I am clearly of opinion upon every principle, upon which the Court acts with regard to the conſtruction of conveyances, that it would be monſtrous in this caſe to hold, that, where there is a power and an intereſt, and the act being equivocal, it is doubtful, whether he acted under the one or the other, the Court ſhould adopt that, which would defeat the inſtrument. But this caſe goes farther; for the act is not equivocal. The party has made uſe of words, that have no reference to the execution of a power. I am of opinion therefore, that this is an exceedingly good title.

The opinions in Contra [illegible] X Butler note 5 Co. Litt. 216. a. pl. 7. 167. Jun. 582. in Maundrell v. do at the Rolls.

X I. of my Case books 172. & M.

(*a*) In *Goodill* v. *Brigham* the power appears to have been conſidered void as an attempt to qualify the abſolute fee-ſimple previouſly given, and to reſtrain the rights incident by law to that eſtate.

Thus a condition inconſiſtent with the gift, as that a legatee, taking the abſolute intereſt by the will, ſhall not diſpoſe of the principal, that tenant in fee ſhall not alien, or tenant in tail ſhall not ſuffer a recovery, is void. So is an exception of the thing, that is the ſubject of the gift. See *Bradley* v. *Peixoto*, *ante*, vol. 3. 324.

The next queſtion, as to the value of the ſubſtituted eſtates, will have an influence as to the coſts. It is very impolitic to give a power to ſubſtitute eſtates without abſolving a purchaſer from the neceſſity of looking after the eſtates ſubſtituted. It is very aukward for a purchaſer to find, he has a fact to look after, whether the ſubſtituted eſtates are of a given value. But the power muſt be executed ſtrictly. I admit, that, if there had been no decree in the cauſe, it is not clear, that it would not have lain upon the purchaſer to ſhew againſt the children the value of the ſubſtituted eſtates. I wiſhed therefore to know, whether the defendant at the time of his purchaſe, knew, it was a title, that could not be made good without the ſubſtitution of eſtates. That does not appear upon his anſwer. With reſpect to the coſts it is very material to know, whether he was appriſed of it. It was a very reaſonable conteſt down to the hearing.

Quære, whether a purchaſer under a power to revoke uſes, ſubſtituting other eſtates of equal value, is not bound to ſhew the value of the ſubſtituted eſtates.

No enquiry was directed: but the Exceptions were over-ruled, and the depoſit divided. The decree directed a ſpecific performance of the contract, and an account of the principal money due, with intereſt at 4 *l.* 10 *s.* (*a*) *per cent.*, but no coſts on either ſide.

(*a*) See *ante*, vol. 2. 411, 412.

May 25.

RUSH *v.* HIGGS.

This Court will not before a decree interpoſe in favour of an executor againſt a creditor proceeding at law.

George Culham by a will, dated the 5th of *May* 1794, and duly atteſted to paſs real eſtate, authoriſed, empowered, ordered, and decreed, *Edward Ruſh* and *George Culham*, jun. and the ſurvivor, his executors and adminiſtrators, as ſoon as might be after his deceaſe abſolutely to ſell and diſpoſe of all and ſo much of his meſſuages, lands, tenements, hereditaments, and eſtates, as was or were copyhold or cuſtomary holden, and alſo of all ſuch parts of his goods, chattels and perſonal eſtate and effects, as ſhould not conſiſt of ready money, or be inveſted upon government or real ſecurities; and his freehold eſtates he deviſed to them, their heirs and aſſigns, in truſt to ſell and diſpoſe thereof, and the money ariſing from ſuch ſales, and the rents and profits of his freehold, copyhold, and perſonal, eſtates, to be diſpoſed of, as aforeſaid, until ſuch ſales, and all ſuch debts owing to him at his deceaſe, which ſhould not be inveſted in ſuch ſtocks, funds, or ſecurities, as aforeſaid, and which he willed his executors to call in, and his ready money at his death, he directed ſhould be applied and diſpoſed of by his executors in payment of all ſuch debts as he ſhould owe by mortgage or otherwiſe, and alſo his funeral and probate charges; and the overplus ſhould be inveſted in the funds or Government ſecurities; the intereſt and dividends of which he directed to be paid to his wife during her widowhood, and within ſix months after her death or marriage the capital to be transferred to his ſon *George William Culham*, with a limitation over in caſe of his death under the age of twenty-one in favor of the teſtator's nephews and nieces.

The teſtator by another will, dated the 4th of *Auguſt* 1797, and duly executed to paſs real eſtates, directs, that, firſt, after his funeral expences and juſt debts are diſcharged, which he leaves to be done by his wife *Lydia Culham* and *Edward Ruſh* as executors, truſting, that *Ruſh* will accept 20*l.* for his trouble, ſecondly, that they be the guardians to his ſon *George Culham*, about nine years of age, until he ſhall be twenty-one. The teſtator next directs, that, until his ſon ſhall arrive at the age of twenty-one, his education and bringing up ſhall be paid out of the rents ariſing from his eſtates; and the overplus, if any, to be taken to and for the uſe of his wife; and he directs, that, when his ſon ſhall be twenty-one, he ſhall pay out of the teſtator's eſtate or eſtates the ſum of 30*l.* ſterling by half-yearly payments to the ſaid *Lydia Culham* during her natural life; and all his houſehold furniture, goods, and ſtock alive or dead, he left to the uſe of his ſaid wife, until his ſon ſhould be twenty-one.

The teſtator died ſoon after the execution of this will; leaving his wife, his only child *George William Culham*, ſtill an infant, and ſeveral nephews and nieces, ſurviving him.

Edward Ruſh, having proved the laſt will, filed the bill upon the 7th of *February* 1799, ſtating both wills; and that the teſtator was indebted to ſeveral perſons, and, among others, to the defendant *Higgs*; who commenced an action againſt the plaintiff; and charging, that the plaintiff has not perſonal eſtate; and that he is not authoriſed to ſell the real eſtate without the conſent of the teſtator's widow and ſon; who inſiſt, that the real eſtate is not liable to the debts; the firſt will being revoked; and, if not, that after-purchaſed eſtates cannot be affected; and that the other defendants, the nephews and nieces of the teſtator, claim ſome intereſt.

The bill prayed an injunction againſt the defendant *Higgs*; and that the defendants may ſtate their claims; and that the plaintiff may have the directions of the Court for the execution of the will, and may be indemnified.

The common injunction having been obtained, the defendant *Higgs* by his anſwer admitted the two wills; and ſtated, that the teſtator was indebted to him in the ſum of 105*l.* 5*s.* and upwards for money lent and advanced, and paid and received to and by the teſtator; that the defendant brought an action, proceeded to trial, and obtained a verdict in *Hilary* Term laſt for that ſum and coſts againſt the plaintiff. The defendant believes, that the declaration was filed in the uſual and common form; and the plaintiff pleaded the general iſſue only; and the defendant believes, that the plaintiff at the time of putting in his ſaid plea had poſſeſſed, and that he ſtill poſſeſſes, ſufficient effects of the ſaid *George Culham* to anſwer the defendant's ſaid debt.

In the laſt term, juſt before the riſing of the Court, the common order for diſſolving the injunction *Niſi* having been obtained upon the anſwer's coming in, Mr. *Fonblanque* ſhewed cauſe againſt diſſolving the injunction; and it was ordered to be continued.

Mr. Owen for the defendant moved to diſcharge that order.

The Lord Chancellor ſaid, he had taken it, that there had been a decree for an account: but it was afterwards mentioned, that there had not been a decree; and he had immediately ſtopped the order.

Mr. Manſfield and Mr. Fonblanque for the plaintiff—Though there has been no decree, enough appears upon this Record to entitle the plaintiff, the executor, to protection. Upon principle and authority an executor may come into this Court, and protect himſelf in the execution of his truſt even againſt a judgment obtained at law. The general opinion is, that there muſt be a decree, and a decree obtained by another creditor. The effect of that is, that, unleſs the executor can prevail upon a creditor to inſtitute a ſuit againſt him, which in the time of Lord *Talbot* was conſidered as colluſion, he is at the mercy of the creditors. He may come into this Court, and ſtate a caſe entitling him to the interference of the Court againſt a creditor ſuing at law. In *Buccle* v. *Atleo*, 2 *Vern.* 37. an executor brought a bill againſt all the creditors to aſcertain, who was to be preferred: a demurrer by one was overruled. Upon ſuch a bill the aſſets would be equally under the adminiſtration of the Court as upon a bill by a creditor. The objection is, that the executor might diſmiſs his bill, or not go on with the ſuit: but the anſwer to that would be, that if he did ſo, or was guilty of any delay, the creditor, againſt whom he applied, would have the benefit of the legal proceeding.

This executor by miſtake did not plead *Plene adminiſtravit*. He pleaded the general iſſue; which by legal implication makes him anſwerable for aſſets. That rule has been thought very hard even in a Court of Law. In *Erving* v. *Peters*, 3 *Term Rep. B. R.* 685. Lord *Kenyon* ſays, he yields to the weight of the authorities, but not to the reaſoning of them. This executor being empowered by the firſt will to ſell the real eſtate in the event of the inſufficiency of the perſonal to anſwer the debts, is ſued by a creditor, and does that, which amounts to an admiſſion of aſſets. It turns out, that there is a ſubſequent will, which revokes the former. He was miſtaken in point of conſtruction; and the queſtion is, whether the Court will not relieve him againſt the effect of ſuch miſtake. If the aſſets had been diminiſhed, the Court would have relieved him; as where part of the property was deſtroyed by fire. As he acted upon a falſe impreſſion, this Court will protect him.

Mr. Owen in ſupport of the motion—The ground of the modern caſes in favour of the power of the Court to interpoſe after a decree is this. In *Morrice* v. *The Bank of England* (*a*) it was decided, that a decree in equity is equal to a judgment at law. Then the creditor availing himſelf of the decree had priority before every creditor, who had not obtained a judgment. But in

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(*a*) *For.* 217. 4 *Bro. P. C.* 287. *Searle* v. *Lane*, 2 *Vern.* 88.

Darſton v. *The Earl of Oxford* (*a*) it was determined, that an executor may voluntarily, if he pleaſes, pay a ſpecialty debt pending a ſuit upon a bill filed by another creditor of equal degree. Suppoſe the caſe in *Vernon* to ſtand; where all the creditors were before the Court: in this caſe the action was brought by one creditor; and the bill is againſt him only. *Ramſden* v. *Jackſon* (*b*) is conſidered in *Erving* v. *Peters* a deciſion upon the point, that the plea of the general iſſue by an executor is an admiſſion of aſſets; and after verdict he cannot take advantage of what might have been pleaded. Mr. Juſtice *Buller* in *Erving* v. *Peters* removed the difficulty Lord *Kenyon* felt; and ſtated *Rock* v. *Leighton* (*c*), which is not truly reported in *Salkeld*, from Lord *Holt*'s Manuſcript, who citing *Kilborn* v. *Rack* obſerves, that in regard the defendant might have pleaded the matter to the *Scire facias*, and had omitted it, he had loſt the benefit thereof.

Skelton v. *Hawling* (*d*) is to the ſame point. In *Brooks* v. *Reynolds* (*e*) the reaſon given by the Lord Chancellor for granting the injunction is, that this Court having taken the fund into its own hands will not permit the executor to be purſued at law. That caſe and *Hardcaſtle* v. *Chattle* (*f*) were after a decree; which is ſtated to be the chief conſideration in *Martin* v. *Martin* (*g*). There is no inſtance of an injunction before a decree: the creditor may ſue, and gain priority, if he can.

In this caſe the action was brought in *Trinity* Term 1798. The declaration was filed in *Michaelmas* Term. The inventory was made on the 15th of *December* 1798. The defendant pleaded *non aſſumpſit* upon the 23d of *January* 1799. The bill was filed in *February* 1799. The trial was at the Sittings after *Hilary* Term; and the judgment was in *Eaſter* Term. The admiſſion of aſſets by the plea is concluſive. Nothing of the ſuppoſed miſtake appears in the anſwer: to which alone the Court can attend. The anſwer inſiſts, that the plaintiff had aſſets. The miſtake is mere allegation. There is not a ſuggeſtion in the bill about it. The rule of evidence muſt be the ſame in equity as at law. If the plaintiff comes upon miſtake, he muſt firſt prove, he had no aſſets. That muſt be decided by a jury; and it has been decided at law, that the

(*a*) 3 *P. Wms.* 401. *n.* (*b*) 1 *Atk.* 292. (*c*) 1 *Salk.* 310. (*d*) 1 *Wilſ.* 258. (*e*) 1 *Bro. C. C.* 183. (*f*) 4 *Bro. C. C.* 163. (*g*) 1 *Veſ.* 211.

Record is concluſive evidence of aſſets. The mere purpoſe is delay. The fact is, and it appears upon the account taken in the Eccleſiaſtical Court, that the plaintiff is in poſſeſſion of aſſets more than ſufficient for this debt.

The Solicitor General (*Amicus Curiæ*)—In *Martin* v. *Martin* Lord *Hardwicke* ſays, that from the confuſion and inconvenience in reſpect of the adminiſtration of aſſets it had been deſired, that a new proviſion ſhould be made by the legiſlature concerning it. A direction was given to the Judges, that a bill ſhould be brought in as to the perſonal aſſets; and a ſhort bill was brought in upon the caſe of *Morrice* v. *The Bank of England*, but laid aſide from the difficulty. The ground was much argued before Lord *Thurlow*, that after a decree a Court of equity has a right to control all ſubſequent proceedings of creditors: for unleſs it does, they would gain priority, and the Court could not carry into effect its own decree, and make equality among the creditors.

LORD CHANCELLOR—The caſe in *Vernon* is very ſingular. How can there be a bill againſt all the creditors? Has that caſe ever been followed? Is there any inſtance, in which a creditor at law has ever been ſtopped, unleſs there was a decree, under which he could come in?

In this caſe I really took it for granted, that there had been a decree; and under that impreſſion I directed them to go before the Maſter. Afterwards on being informed, that there was no decree, I ſtopped the order. I cannot ſtop a creditor at law, unleſs there is a decree, under which he can go in.

Injunction diſſolved.

1799.

May 28.

DE MAZAR *v.* PYBUS.

KNUDSON *v.* PYBUS.

A partnerſhip in *London* being appointed, not individually but as a firm, executors and guardians, claimed the reſidue undiſpoſed of in excluſion of perſons appointed attorneys, executors and guardians, in *Denmark*, and others appointed attorneys and executors in *India*; decreed a truſt for the next of kin; and it was referred to the Maſter to appoint a guardian.

CHRISTIAN KNUDSON by his will, made in the *Eaſt Indies*, and dated the 4th of *June* 1792, after an introduction declaring that inſtrument his will, and that he was in his perfect ſenſes and good health, &c. proceeded thus:

“ And in order to prevent all diſputes between my relations touching my earthly property, all and every part of which being of my own acquiring it gives me conſequently full and ample power according to all human laws and *cuſtoms* to give and bequeath and beſtow of the ſame to whom and in what manner it ſeemeth moſt honourable and fit; and accordingly I do hereby nominate and conſtitute and appoint the Honourable *Niels Ryberg* and Captain *William Haſte*, both of *Copenhagen*, *Denmark*, to be my lawful attorneys and executors to this my will as well as guardians to the following infant children in that country, now in *England* for their education. I do alſo hereby nominate, conſtitute, and appoint, the houſe of Meſſrs *Pybus*, *Call*, and *Grant*, of *New Bond-Street*, *London*, in *England*, my true and lawful executors to this my laſt will and teſtament as well as guardians to the aforeſaid children: namely *St. George Knudſon*, *Cecilia Knudſon*, and *Eloiſa Knudſon*, commonly called my children, in the ſaid country for their education. *Item*, I do alſo nominate, conſtitute, and appoint, Lieutenant *William Henry Hicks*, my *Aid de Camp*, and *Henry Wilſone* Eſq. of *Calcutta* in *Bengal*, my true and lawful attorneys in that country and executors of this my laſt will and teſtament. I enjoin my executors to ſee my earthly remains committed to it's mother earth in a ſuitable and ſoldier-like manner: 1000 Siccas to be paid as a preſent to the ſoldiers, who carry my corpſe to the grave: 500 more to be diſtributed in alms indiſcriminately upon the day of my interment upon the ſpot: a ſword to be given to the brigade major of the ſtation; alſo one to each of the adjutants. I do hereby give and bequeath to my dear and beloved *St. George Knudſon*, commonly called my ſon, the ſum of 40,000 *l.* ſterling; to which amount a landed eſtate is to be purchaſed for him in either of the kingdoms of *Denmark* or

England; in which country he liketh beſt to reſide in; and it is my will and commands, that the ſaid *George Knudſon* be put in full poſſeſſion of the ſaid eſtate, when he attains the years of maturity preſcribed by the laws of the country he may chooſe to live in: but in caſe of his demiſe before that period of years, or ſhould he be married, and have no male or female iſſue by his marriage, the ſaid landed eſtate to be as appertaining to my family: that is to ſay, a ſteward at 100*l. per annum* to have the management thereof; and the produce from the ſaid eſtate, to be called *Berrily*, to be diſtributed in charity and for the relief of the poor and deſerving of the country the ſaid eſtate may ſtand in. *Item*, I do alſo hereby give and bequeath to my dearly beloved *Cecilia Knudſon*, commonly called my daughter, the ſum of 10,000*l.* ſterling; and which ſum it is my will and commands be paid her on being diſpoſed of in lawful wedlock by the approbation and conſent of her guardians: but in caſe of her demiſe before ſhe, the ſaid *Cecilia*, arrive to that ſtate, or before ſhe arrive at the age of maturity, my legacy to her in that event is to be equally divided between *St. George Knudſon* and *Eloiſa Knudſon*. *Item*, I do alſo hereby give and bequeath to my dear and beloved *Eloiſa Knudſon*, commonly called my daughter, the ſum of 10,000*l.* ſterling; and which ſaid ſum it is my will and commands ſhall be paid her upon her being beſtowed in lawful marriage by the approbation and conſent of her truſtees and guardians: but in caſe of the ſaid *Eloiſa* dying before that event my legacy to her is to be equally divided between *St. George Knudſon* and *Cecilia Knudſon*. *Item*, I do hereby will and bequeath to my *Aid de Camp* Lieutenant *William Henry Hicks* the ſum of 8000 *Calcutta Siccas*. *Item*, I do hereby will and bequeath to my dear beloved ſiſter Lady *Bergetta Maria Mazar* all my fund in the hands of my attorney, the the Hon. *Niels Ryberg*, of *Copenhagen*, *Denmark;* of which ſhe will take immediate poſſeſſion: but in caſe of her death, before my will reaches *Europe*, without any iſſue by the ſaid marriage with *Frederic De Mazar* Eſq., my legacy to her it is my will and commands be equally divided between *St. George Knudſon*, *Cecilia Knudſon*, and *Eloiſa Knudſon*, or in the event of the death of any of the aforeſaid children this legacy is to be equally divided betweeen the ſurvivors."

The

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De Mazar v. Pybus.

The teſtator then after giving ſome other legacies directed, that all his property then in the country ſhould be remitted home for ſafety through the Company's treaſury to the houſe of Meſſrs *Pybus, Call, Grant* and Co., *New Bond-Street, London;* and he declared his will and commands to be, that the amount ſhould be depoſited in the Government funds upon the lawful intereſt of the country, until the ſame might be required for fulfilling the ſeveral legacies made by him and ſpecified in his ſaid will. Then ſtating his ſituation, at a great diſtance from the *European* colonies, where alone documents of this ſort are properly prepared, he thereby in the moſt ſolemn manner enjoined his ſaid executors of that his will in the fulleſt ſenſe to carry all and every part thereof into effect, and particularly to treat the children committed to their truſt with due lenity and care.

The teſtator died in *India* upon the 31ſt of *Auguſt* 1793; leaving perſonal property to the amount of 71,106*l.* 8*s.* 11*d.*; which was remitted to *England* according to the directions of the will.

Two ſuits were inſtituted: the firſt, upon the bill of *Frederic De Mazar* and his wife, the ſiſter and ſole next of kin of the teſtator; claiming the reſidue, as being undiſpoſed of. The other bill was filed by *Cecilia* and *Eloiſa Knudſon*, the former of whom had attained the age of twenty-one; praying, that an account might be taken of what was due to them in reſpect of their legacies, with intereſt from the death of the teſtator, or ſuch other ſum as they ſhould appear entitled to for maintenance and education, and an account of what had been laid out by the defendants *Pybus* and Company in their maintenance and education; and that what might be found due to the plaintiff *Cecilia Knudſon* might be paid to her, and what might be found due to *Eloiſa Knudſon* might be ſecured for her benefit.

The defendant *Pybus* and Co. claimed the reſidue beneficially. Neither they nor the plaintiffs *De Mazar* and his wife reſiſted the claim of the children to intereſt upon their legacies.

The anſwer was not replied to.

The *Solicitor General, Mr. Graham, and Mr. Scafe for the plaintiffs De Mazar and his wife*—The point as to intereſt upon the legacies to the children is not conteſted by the plaintiffs; as it is to be inferred, that the teſtator placed himſelf *in loco parentis* as to them; and intended them to have the income of their fortunes. If however it was to be diſputed, there would be good ground for contending, that the children were entitled to maintenance only.

Upon the ſecond queſtion, the next of kin are clearly entitled to the reſidue upon the principles in *Bowker* v. *Hunter* (*a*), *Clennell* v. *Lewthwaite* (*b*), and the other caſes upon this point. In this caſe there are circumſtances almoſt irreſiſtible. It is impoſſible for the court to prefer one ſet of executors to another. It is equally clear, that the teſtator could not mean them to take as joint tenants. Upon the whole will a plain intention appears, that they ſhould take merely an office. The teſtator does not name them individually, but as the houſe of *Pybus, Call, and Grant.* The houſe is liable to a change of partners. He could not mean to give them in that character the beneficial intereſt.

The Attorney General, Mr. Grant, Mr. Steel, and Mr. W. Agar, for the defendants Pybus and Co.—Theſe defendants muſt claim upon ſome ground diſtinct from that, upon which the reſidue would be claimed by all the executors: but this will does furniſh that diſtinct ground. The law gives the reſidue to the executors, provided an intention, that they ſhall not have it, does not clearly appear. It may be contended upon this will, that neither the *Daniſh* nor the *Indian* executors could claim in that character; for the teſtator appoints them attorneys and executors: but he appoints theſe defendants only executors and guardians. That is the common form of an appointment of executors. The form, in which the others are appointed, raiſes a preſumption, that the teſtator intended to give them an office only. Wherever there is a mere appointment of executors, it is thrown upon the next of kin to ſhew, the teſtator did not mean that appointment to have the legal effect. Perhaps, as it has been ſaid, he had no conception, that an appointment of excutors would give

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(*a*) 1 *Bro. C. C.* 328.

(*b*) *Ante*, vol. 2. 465. 644. In that caſe *Nourſe* v. *Finch* and *Hornſby* v. *Finch*, *ante*, vol. 1. 344. Vol. 2. 78. and in Mr. *Cox*'s note to *Farrington* v *Knightly*, 1 *P. Wms.* 550. the principal authorities are referred to. See alſo *White* v. *Evans*, and *Holford* v. *Wood*, *ante* 21. 76.

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the reſidue; but a clear intention muſt be ſhewn to take from them their legal right. There muſt be a negative intention. Certainly the appointment of a Houſe in partnerſhip is different from the appointment of individuals; but he knew one of theſe partners intimately, and was under great obligations to him. The teſtator has appointed them to take care of his children. He directs his eſtate to be remitted home to them, ultimately to be diſpoſed of here. They are the only perſons, to whom the appellation of executors ſolely is given. It is manifeſt, that the teſtator intended to diſpoſe of his whole property; for he expreſsly declares that intention. What reaſon can there be for the diſtinction between theſe defendants and the other perſons, except, that, as the whole property is to be remitted finally to *England*, therefore he appoints the others his attorneys. The teſtator owed his riſe entirely to theſe defendants.

Lord Chancellor—How can I take that hiſtory for granted? You might have gone into evidence upon that.

Thoſe, who have brought forward this queſtion ſeriouſly, have totally forgot the laſt declaration of the teſtator, ſtating his ſituation, at a great diſtance from the *European* colonies, where alone documents of this ſort are properly prepared, with an adjuration to his executors to give effect to the will according to his intention. A much better argument may be raiſed for the other executors than for theſe in *England*; for no man could be abſurd enough to make a partnerſhip executors in order to take the reſidue; that they are very fit to conduct the office and buſineſs of executors, where money is to be collected in one country, to be remitted to another, and ſecured, is very plain. But if the rule holds, that calling a perſon executor *ex vi termini* carries a gift of the reſidue, the addition, that he is to be attorney, will not take away the effect of the other word; and, in ſpeaking of the probability, it is much more probable, that the teſtator ſhould intend perſons he knew to take the reſidue than the members of a partnerſhip, who might at his death be very different perſons from thoſe at the date of his will. They are directed to place the whole property out in the funds for the ſecurity of the legacies. In the ſtate of ignorance, in which he was, he preſcribes to them what they are to do. It is impoſſible to raiſe an argument upon it.

With respect to the other point, there is no expreſs gift of the intereſt to the legatees; and the teſtator has expreſsly directed the money to be remitted in a way, that he knew produced intereſt. There is a very good ground for contending, that the children are entitled to maintenance only.

Declare, that the next of kin are entitled to the reſidue. Let the Maſter appoint a guardian for the children. I cannot appoint a partnerſhip guardians.

LOWNDES *v.* STONE.

May 28.

THOMAS LOWNDES, a clergyman, by his will, dated the 13th of *January* 1795, after giving ſeveral ſpecific and pecuniary legacies, and among them legacies of ten guineas each to the poor of *Aſtwood* and *North Crawley*, to be diſtributed by his executor or executors upon *Chriſtmas Day* next after his death, and a legacy of 100*l.* to his nephew *Richard Lowndes*, gave and bequeathed the reſidue of his property in the following manner:

"The remainder and reſidue of my eſtate if any and effects "of what nature ſoever and whereſoever, which I ſhall at my "deceaſe be ſeiſed on poſſeſſed of or entitled unto or intereſted in "I give next kin or heir at law whom I appoint my executor "after all my debts and funeral expences are paid."

This will was unatteſted. The teſtator died leaving *Henry Lowndes*, his only ſurviving brother. Their eldeſt brother died in the teſtator's life; leaving a ſon, *William Lowndes Stone*, and a daughter *Caroline Lowndes*. Three other brothers alſo died in the teſtator's life: two without iſſue: the third left two ſons *Richard Lowndes* and *William Lowndes*.

The will was filed by the teſtator's ſurviving brother *Henry Lowndes*, claiming the whole reſidue.

The defendant *William Lowndes Stone*, the heir at law of the teſtator, alſo claimed the whole. The other nephews and the niece claimed their ſhares as next of kin.

Teſtator by a will unatteſted, after, amongothers, charitable legacies, to be diſtributed by his executor or executors, gave the remainder and reſidue of his eſtate, if any, and effects of what nature ſoever, and whereſoever, which he ſhould be ſeiſed on poſſeſſed of, &c. "next kin "or heir at "law whom "I appoint "my executor" after debts, &c. paid. He left one brother, and by deceaſed brothers a niece and ſeveral nephews, one of whom was heir at law. Diſtribution decreed according to the *Statute*.

The Attorney General and Mr. Romilly for the plaintiff—Upon the true conſtruction of this will the plaintiff is entitled excluſively to the whole reſidue: if not, then, the property being perſonal, the next of kin are in the contemplation of the teſtator the heirs at law *quoad* this property; and he did not mean to give it to the heir at law, who would take the real eſtate, if there was any. It is given to the next of kin in the ſingular number. In the former part of the will, giving the charitable legacies, the teſtator ſuppoſes, he may have more repreſentatives than one. According to ſtrict language, if he had been aſked, who was his next of kin, he would have anſwered, his brother *Henry;* for in ſtrictneſs the children of his deceaſed brothers are not his next of kin; though in the diſtribution they repreſent their parents. He means his brother *Henry* as his next of kin to take this property. If he had died in the teſtator's life, in which caſe the nephews and niece would be the next of kin, then they would have been the reſiduary legatees. In the one caſe the teſtator's brother would be the executor, in the other the nephews and niece would be the executors, to diſtribute the charitable legacies. Though the will is unatteſted, the teſtator conceived himſelf to be diſpoſing of real as well as perſonal eſtate.

The Solicitor General for the teſtator's niece and all his nephews except the heir at law—The intention is, that whoever would by law take the property ſhall have it. It is clear, the teſtator had in contemplation ſomething different from what is contended by the plaintiff. There is no real eſtate; and the will is not atteſted. There was no intention therefore as to real eſtate. The conſtruction, that the brother muſt be conſidered the next of kin to the excluſion of the nephews and nieces, cannot poſſibly hold. There is no conſtruction, that can by poſſibility exclude thoſe entitled under the *Statute of Diſtributions* (*a*); for if the words "*next kin*" and "*heir at law*" are ſynonymous, thoſe entitled under the *Statute* muſt take: if they are not ſynonymous, the diſpoſition is void for uncertainty.

Mr. Manſfield and Mr. Wooddeſon for the heir at law—The heir at law is the only perſon, that can anſwer the deſcription. That deſcription is good as *deſignatio perſonæ* with reſpect to per-

ſonal

(*a*) 22 & 23 *Char.* 2. c. 10. 29 *Char.* 2. c. 3.

ſonal as well as real eſtate. An executor is appointed in the ſingular number. It is extraordinary, that the teſtator ſhould add "*heir at law*", meaning next of kin. He meant to correct the former deſcription by explaining it to mean heir at law: that is, ſuch next of kin, who ſhall be at the ſame time heir at law. This conſtruction gives effect to every word of the clauſe.

LORD CHANCELLOR—You have a fair retort upon each other. On one ſide it is contended, that "*next of kin*" means "*heir at law*": on the other, that "*heir at law*" means "*next of kin*". It muſt be diſtributed according to the *Statute*.

DORAN *v.* SIMPSON.

June 3.

Though generally a bill by thoſe intereſted in the perſonal eſtate, as creditors or next of kin, will not lie againſt a debtor to the eſtate, it will under circumſtances, as, in this caſe, upon colluſion with the repreſentative. The defendant was alſo liable in the character of truſtee and agent.

JOHN DORAN of *New Providence* died inteſtate in *January* 1785; leaving a widow, *Martha Doran*, and three infant children ſurviving. On the 15th of *February* 1785 *Martha Doran* obtained adminiſtration in *New Providence*. In *October* or *November* following ſhe married —— *O'Halloran* without making any proviſion for her children by her former huſband, or ſecuring their diſtributive ſhares. In 1787 *O'Halloran* came to *England*, and obtained adminiſtration in right of his wife; upon which this ſuit aroſe.

The bill was filed upon the 23d of *March* 1787 on behalf of the infant children of *Doran* againſt *O'Halloran* and his wife, *John Simpſon*, *John Graham*, and *John Tunno*; ſtating, that ſeveral dealings had taken place between *John Doran* and the partnerſhip of *John Simpſon* and *James Graham*, deceaſed, upon which a balance of near 4000*l.* was due to the eſtate of *Doran*; and that *Joſeph Green*, of *Briſtol*, who was uncle to Mrs. *O'Halloran*, on behalf of the plaintiffs applied to *O'Halloran* for an account; and apprehending his intention of leaving the kingdom without accounting requeſted *Simpſon* not to pay the balance to him.

The bill charged colluſion between the defendants *Simpſon* and *O'Halloran*; that *Simpſon* was poſſeſſed of 3,500*l.* belonging to the eſtate of *Doran*, and particularly of two bonds from *John Graham* and *John Tunno*, each for 1500*l.*; that *Simpſon* and *O'Halloran* ſettled an account; that the account was not fairly ſettled, or properly examined; and it contained many errors in favour of *Simpſon*; that he never paid to *O'Halloran* any money on the account; or, if he did, it was after the bill was filed, or notice, that a bill had been, or would be, filed to ſecure the property; and he knew, or ſuſpected, or had reaſon to ſuſpect, that *O'Halloran* had not taken out adminiſtration, or was in inſolvent or doubtful circumſtances, and was about to go abroad. The bill charged converſations between *Green* and *Simpſon* to that effect, and as to the proper means of ſecuring the property, before adminiſtration was granted to *O'Halloran*, or any payment was made to him by *Simpſon*; and that *Green* requeſted him not to pay *O'Halloran*; notwithſtanding which payments were made, or ſecurity was given by *Simpſon* to *O'Halloran*, before adminiſtration was obtained by him; and *Simpſon* gave ſome bills or notes or other ſecurities to *O'Halloran* on account of the eſtate of *Doran*; and afterwards aſſumed the two bonds for 1500*l.* each, due to the eſtate of *Doran* to himſelf; and paid or pretended to pay the amount to *O'Halloran*; that *Simpſon* entered a *Caveat* in the name of *Green* or ſome other perſon againſt *O'Halloran*'s obtaining adminiſtration; and afterwards withdrew it; that in oppoſing the adminiſtration he acted as agent for *Green*; but he withdrew the *Caveat* without authority; *Green* being about to ſet out for *London* to litigate the adminiſtration; and that *Simpſon*, though he was agent for *Green*, permitted improper ſureties to be taken for *O'Halloran*'s duly adminiſtering. The bill farther charged, that *O'Halloran* and his wife intend to call in all the debts, and have received part of the property; that they intend to go abroad; and have commenced an action againſt *Green* for recovering of 700*l.* 4 *per cent.* Conſolidated Bank Annuities, the produce of 400*l.*, part of the money due to the eſtate of *Doran*, and paid by *Simpſon* and *Graham*.

The prayer of the bill was, that *O'Halloran* and his wife may account for the perſonal eſtate of *Doran*, come to their hands, after payment of his debts and funeral expences; that they may be reſtrained from proceeding in their ſaid action againſt *Green*, and from recovering any money due upon ſecurities in the hands of *Green*, *Simpſon*, *Graham*, and *Tunno*, and other perſons, belonging to *John Doran*, deceaſed; that *Simpſon*, *Graham*, and *Tunno*, may pay the money due from them reſpectively into the bank, and be reſtrained from paying it to *O'Halloran* and his wife; that *Simpſon* may account for ſo much of the perſonal eſtate of *Doran* as was in his hands at the time *Green* gave him notice not to pay to *O'Halloran*; that the reſidue may be aſcertained, and two third parts be ſet apart and appropriated for the benefit of the plaintiffs according to the *Statute of Diſtributions*, and laid out, *&c.*; that a writ of *Ne exeat regno* may iſſue againſt *O'Halloran*; and, if it ſhall appear, that *Simpſon* has paid to *O'Halloran* any of the monies aforeſaid, that he may be decreed to anſwer the ſame; or if it ſhall appear, that he has given ſecurities, that he may be reſtrained from paying the monies mentioned therein to *O'Halloran*, and may pay the ſame into court; and that *O'Halloran* may be reſtrained from negotiating ſuch ſecurities.

The defendant *Simpſon* put in five anſwers; and the bill was amended after each of the firſt four. The laſt amendment was upon the 28th of *February* 1798. *Joſeph Doran*, one of the infant plaintiffs died; and the bill was revived againſt *Joſeph Green*; who took out adminiſtration to him. *O'Halloran* and his wife being alſo dead, the bill was again revived againſt —— *Gueſt*; who took out adminiſtration to *Martha O'Halloran* and adminiſtration *de bonis non* of *John Doran*.

The defendant *Simpſon* by his firſt anſwer, which was filed in *September* 1787, ſtated, that in *Auguſt* 1782 *John Doran* being engaged in a ſea-faring life became concerned with this defendant and *James Graham*; and there was an account current between them. Upon the laſt account in 1784 a balance of 3856*l.* 1*s.* 3*d.* was due to *Doran*. The defendant *John Graham* being indebted to the partnerſhip of *Simpſon* and *James Graham* gave his bond to them for 1500*l.* with intereſt, dated the 20th of *January* 1785, and payable the 20th of *January* 1787. *John Tunno* being likewiſe indebted to the partnerſhip of *Simpſon* and *Graham* in a large ſum gave them his bond for 1500*l.* with intereſt, dated the 1ſt of *March* 1785, and payable the 1ſt of *March* 1787. Theſe bonds were afterwards delivered up to the obligors cancelled. The defendant admits payment of 500*l.* to *Joſeph Green* on the 9th of *April* 1785 by the order of *Martha O'Halloran*. In the books of the partnerſhip this defendant charged the ſaid two ſums of 1500*l.*, as if lent out of the money of *Doran*: but they were their own money. They alſo charged to the account of *Doran* the 400*l.* paid to *Green.* Upon or ſoon after delivering up the two bonds cancelled the defendant did duly credit the account of *Doran* for the ſaid ſums. Adminiſtration was granted to *O'Halloran* ſome time in *March* laſt; and ſoon afterwards *O'Halloran* as adminiſtrator requeſted *Simpſon* and *Graham* to render an account current of all money tranſactions between them and *Doran*; which the defendant did; and the ſaid ſums of 1500*l.* and intereſt were entered among other articles. The balance due from the defendant as ſurviving partner, amounted to 3187*l.* 13*s.* 2*d.* That account was examined, ſettled, and adjuſted, and ſigned, and the ſaid balance duly paid or ſatisfied, by the defendant on the 9th of *March* laſt. No other ſum belonging to *Doran*, nor any ſecurity, remains in his hands, nor in particular the ſaid two bonds: the defendant having previouſly to the 9th of *March* delivered them up cancelled.

The defendant *Simpſon* by his ſecond anſwer ſtated, that he paid or ſatisfied the balance of 3187*l.* 13*s.* 2*d.* on the 9th of *March* 1787 to *O'Halloran* by transferring the ſame at his requeſt and by his direction to his private or ſeparate account with the defendant, trading under the firm of *Graham* and *Simpſon.* The ſaid ſeparate account was on the ſame 9th of *March* duly ſettled and adjuſted, and the balance due to *O'Halloran* upon that account appeared to be 2541*l.* 16*s.* 10*d.*; which was thereupon at the like requeſt and direction of *O'Halloran* transferred to his credit in account with this defendant *Simpſon* and *Daviſon*, his preſent partner; and they have ſince paid thereout divers ſums to or on account of *O'Halloran* in their buſineſs as merchants. The defendant denies that the ſaid account mentioned in the bill was not fairly ſettled, or that *O'Halloran* did not ſtrictly examine it, or that there were errors. He denies that he never paid or ſatisfied to *O'Halloran* any money on the account aforeſaid; or that he paid or ſatisfied the ſame or any part thereof after the filing of the bill, or after he was ſerved with proceſs to anſwer the ſame; and ſays, the ſame was fairly and *bonâ fide* ſettled, and the balance paid or ſatisfied, at the time and in the manner before mentioned. He denies, that at the time he made ſuch payment or ſatisfaction he knew or believed, or ſuſpected, or had any reaſon to believe or ſuſpect, that *O'Halloran* had not taken out adminiſtration, or that (ſave as after mentioned) he was in insolvent or doubtful circumſtances, or that the eſtate was likely to be miſapplied by him; but admits, he knew, *O'Halloran* intended, or was about, to go abroad, and that he was not a native or reſident in this country. He admits, that *Green*, before *O'Halloran* had taken out adminiſtration, and before the defendant had paid or ſatisfied to him any thing, had many converſations and ſome correſpondence with this defendant reſpecting the property of *Doran* in his hands and the moſt proper means of ſecuring it againſt *O'Halloran*, and that the defendant agreed with *Green*, that it ought to be ſecured. He admits, he was induced by the repreſentations of *Green* to believe or ſuſpect, that the property, if paid to *O'Halloran*, might be miſapplied or in danger of being loſt; and that *Green*, before this defendant made any payment or ſatisfaction, deſired him not to pay any thing, and informed him of the danger the property would be in, if it ſhould get into the hands of *O'Halloran*; and under ſuch apprehenſion, and not knowing, that *O'Halloran* had or would have any lawful right to be paid, this defendant declared, he would not pay any part to *O'Halloran*: but this was before his arrival and before adminiſtration granted to him. Previouſly to that adminiſtration this defendant co-operated with *Green*, and conſented to become joint adminiſtrator with him; and they applied accordingly: but *O'Halloran* arrived, and cauſed a *Caveat* to be entered, and obtained adminiſtration; and thereupon or ſoon afterwards as adminiſtrator he peremptorily demanded an immediate ſettlement of the account between this defendant and *Doran*'s eſtate; and defendant finding him legally authoriſed, and conceiving himſelf no longer able to oppoſe him with effect, or with propriety to reſiſt the payment to him, did accordingly pay or ſatisfy him in reſpect of the ſaid account before the filing of the bill, and to the beſt of his remembrance or belief before he had any knowledge or notice, that any bill was to be filed, in the manner and at the time before mentioned. He does not know, when he had firſt notice, that the plaintiffs would file a bill; but to the beſt of his remembrance and belief it was but very ſhortly, if at all, before the bill was filed. He denies, that to the beſt of his knowledge or belief *O'Halloran* was inſolvent at the time the account was ſettled. He admits, that upon the repreſentations of *Green* he thought it probable, *O'Halloran* might uſe ſome of the monies paid to him as adminiſtrator: but he (this defendant) thought himſelf bound to pay. He denies, that he paid all or any part, or gave any ſecurity to *O'Halloran*, before

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O'*Halloran* procured adminiſtration; except that prior to granting the adminiſtration the defendant paid and advanced ſeveral ſums of money to O'*Halloran* upon his ſeparate and private account; and the defendant charged all ſuch payments to the ſeparate account, and not to his account with *Doran*'s eſtate. He cannot ſet forth, when adminiſtration was granted; nor, whether he ſaw the ſame before the 9th of *March*: but he ſaw the ſame upon that day, and before he paid or ſatisfied O'*Halloran* the ſaid balance.

The account entered under the date of the 9th of *March* 1787 contained the following entry:

“ By our aſſumption of *Graham*'s bond 1500*l.*”

The account contained a ſimilar entry as to *Tunno*'s bond; with intereſt upon each. A receipt for the balance was ſigned by O'*Halloran*.

The third anſwer contained the account of *Doran* from the 31ſt of *December* 1784, the date of the former ſettlement, to the 30th of *June* 1786. The balance then due to the eſtate of *Doran* was 144*l.* 18*s.* 9*d.*, after charging the ſaid eſtate with two ſeveral ſums of 1500*l.* in the ſaid account mentioned to have been lent by *Graham* and *Simpſon* to *John Gregory* and *Tunno* upon their reſpective bonds. The account was farther continued to the 9th of *March* 1787. The balance then was 3187*l.* 13*s.* 2*d.* In ſuch account credit was given to the eſtate for the ſaid two ſums and the intereſt upon the ſaid bonds, as having been received by *Simpſon* in diſcharge thereof. The defendant admits, 500*l.* was paid by him and his partner *Graham* to *Green*. He admits frequent requeſts from *Green* not to pay to O'*Halloran*, but cannot ſet forth, when they were firſt made. They received a letter from *Martha* O'*Halloran* from *New Providence*, dated the 26th of *Auguſt* 1786, expreſſing her hope, that they had not proteſted O'*Halloran*'s bills, and that they would ſettle with him finally; and ſaying, ſhe had redrawn bills, and hoped, they would honor them. On the 8th of *March* the defendant received a letter from O'*Halloran*, after having obtained adminiſtration; ſaying, he would come the next day to make a final ſettlement, and deſiring the defendant to be prepared, or to abide the conſequences; and ſaying, that he (O'*Halloran*) had directed a bill in *Chancery* to be filed againſt *Green* without delay.

For that reaſon the defendant ſubmitted. The account was ſettled on the 9th of *March* in the preſence of the clerk of the defendant's ſolicitor; and the balance was upon the ſame 9th of *March* or in ſome convenient time afterwards transferred to the private account of *O'Halloran* in the uſual courſe of their buſineſs as merchants. The defendant admits, there was no other conſideration for the ſaid transfer. He denies, that he and *O'Halloran* had no dealing until about the time *O'Halloran* called for an account of *Doran*'s eſtate; for the defendant having been informed about *April* 1786, that *O'Halloran* had married the widow of *Doran*, accepted a bill drawn by *O'Halloran* upon him for 23*l.* 17*s.*; which was paid in *July* 1786; which made it neceſſary for the defendant to open an account with *O'Halloran*. The defendant admits, he had no dealings with *O'Halloran* prior to that. *O'Halloran* arrived in *England* in *Auguſt* following; and having brought letters of recommendation from the defendant's correſpondents abroad, the defendant continued his ſeparate dealings with him, and between *July* 1786 and the 9th of *March* 1787 had paid and advanced to him and for his uſe upon his ſeparate and diſtinct account divers ſums of money, amounting in the whole to 645*l.* 16*s.* 4*d.*; and upon the ſaid 9th of *March* 1787 the ſaid account was alſo ſettled; and the ſame being finally ſettled, and the defendant having ſhortly before taken *Daviſon* into partnerſhip, the balance, which remained due to *O'Halloran* upon the ſaid account kept in the firm of *Graham* and *Simpſon*, *viz.* 2541*l.* 16*s.* 10*d.*, which, and no more, was then due on the balance of ſuch account, to the beſt of this defendant's knowledge and belief, was upon the ſame 9th of *March* or in ſome convenient time afterwards transferred from the account in the firm of *Graham* and *Simpſon* to *O'Halloran*'s account with the defendant and *Daviſon*; and proper entries were made in the uſual manner; and the defendant and *Daviſon* in conſequence of ſuch transfer accepted and paid divers bills of exchange, which had been previouſly drawn upon them by *O'Halloran* or his wife on account of *Doran*'s eſtate; which they ſhould not otherwiſe have accepted; and they have ſince alſo paid divers ſums of money on account of *O'Halloran* in the way of their buſineſs as merchants; by reaſon of all which payments the ſaid original transfer or balance of 3187*l.* 13*s.* 2*d.* was very conſiderably reduced. The defendant denies, that *John Graham* or *Tunno* was indebted to the eſtate of *Doran* by bond or otherwiſe

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to the amount of 1500 *l.* each, or any part thereof; or that the defendant did aſſume any ſuch bonds upon himſelf, or pay or pretend to pay the amount to *O'Halloran:* but the defendant admits, that in and prior to the year 1785 they were reſpectively indebted to *Graham* and *Simpſon* as merchants in a conſiderable ſum; and being ſo indebted became bound to them in the ſaid two bonds, dated the 20th of *January* and the 1ſt of *March* 1785. *James Graham* and this defendant lived upon terms of great intimacy with *Doran*, and had liberty to manage his money concerns in *Great Britain*, and particularly his monies in their hands, as ſuited there own convenience and his intereſt; and early in 1785 underſtanding, that he was dangerouſly ill, and apprehending, they might be called upon by his repreſentative for payment of the whole balance without ſuch notice as he would have given, from precaution, and for no other reaſon, and without any intention to injure the eſtate or ſuffer the ſame to ſuſtain any riſk, they charged to the account of *Doran* under the reſpective dates of the 20th of *January* and the 1ſt of *March* 1785 the ſaid two ſums of 1500 *l.* each, as if they had been lent upon the ſaid bonds out of *Doran*'s money. When the bonds became due, or ſoon afterwards, they were by the defendant cancelled and delivered up to the obligors; and the defendant thereupon credited the account of *Doran* with the ſaid two ſums of 1500 *l.* and intereſt from the dates of ſuch bonds to the 9th of *March* 1787, as ſums, the payment whereof had been upon that day aſſumed or taken upon himſelf by the defendant trading under the ſaid firm of *Graham* and *Simpſon.*

By the fourth anſwer the defendant ſtated, that he transferred the balance on the 9th of *March* 1787, or upon the morning of the following day: he does not recollect, which; but ſuppoſes, it was on the 9th from its being entered with that date in the day-book. The transfer was made openly in the counting-houſe in the uſual courſe of buſineſs, not only by the direction of *O'Halloran*, but as an ordinary proceeding in buſineſs; that account being cloſed, and there being another account ſubſiſting.

By the fifth anſwer the defendant ſtated, that he hath been informed and believes, the adminiſtration was granted to *O'Halloran* on the 9th of *March* 1787; and that it was granted to him as the huſband and attorney and for the uſe of *Martha O'Halloran*; and therefore determined upon her death. There was not at the time of filing the original bill, nor at any time ſince, nor is there now, any account between the defendant and *O'Halloran*, ſave the account in the ſchedule annexed, beginning the 9th of *March*. The partnerſhip between the defendant and *Daviſon* commenced on the 1ſt of *January* 1786: but notwithſtanding the accounts of *Doran* were continued under the firm of *Graham* and the defendant. He denies to the beſt of his knowledge, remembrance, and belief, that he entered, or was privy to the entering, ſave as aftermentioned, any *Caveat* in the name of *Green* or any other perſon againſt granting adminiſtration to *O'Halloran*, or that ſuch was entered by any perſon, ſave, as after mentioned, or that this defendant heard or knew thereof, ſave as after mentioned; or that he, or any perſon with his privity, wrote to *O'Halloran* to withdraw the ſame, or concerning the ſame, ſave, as after mentioned. He admits, that *Green* never gave him authority to withdraw ſuch *Caveat;* and that he acted, as he did in that reſpect, without the authority or privity of *Green*. In *February* 1786 the defendant received from *O'Halloran* and his wife a letter of attorney authoriſing him and *Green* to obtain adminiſtration. *O'Halloran* being expected in *May*, the defendant and *Green* thought it prudent to decline applying: but *O'Halloran* not arriving, they applied in *July;* and the commiſſion for ſwearing *Green* duly to adminiſter iſſued, and was returned to this defendant upon the 17th of *Auguſt*: but in that month before any further proceedings *O'Halloran* arrived, and entered a *Caveat*. The defendant is informed and believes, that, pending the proceedings, that is, upon the 8th of *February* 1787, *O'Halloran* received a Letter of Attorney from his his wife; that he applied to *Green*'s proctor; and was informed, that the commiſſion iſſued for ſwearing *Green* operated as a *Caveat;* that many applications were made by *O'Halloran* to *Green*'s proctor as to that obſtacle; and a *Caveat* was entered by *Green*'s proctor; that upon the 7th of *March* 1787 a ſpecial application was made by *O'Halloran*, ſtating the proceedings; and that he had taken his paſſage; and his preſence was neceſſary in *New Providence;* and that his right appeared to the Judge ſo clear in preference to the defendant and *Green* as to admit of no farther litigation; and the Judge thereupon ordered adminiſtration to be granted; which was granted accordingly, bearing date the 9th of *March*. The defendant wrote a letter, dated the 28th of *February*, to *O'Halloran*, in anſwer to one received from him, which is loſt or deſtroyed, aſſuring him, the proctor had no directions from the defendant as to entering the

Caveat; that the defendant and *Green* had applied in conſequence of the powers given them by him (*O'Halloran*) and his wife; that he (the defendant) believed *Smith* (his attorney) employed a proctor to do the buſineſs: but that ſince *O'Halloran* came, and entered a *Caveat* for reaſons beſt known to himſelf, he (the defendant) had not interfered. The defendant always underſtood, adminiſtration was granted to *O'Halloran* as huſband and attorney of *Martha O'Halloran*, not by reaſon of any letter or act of the defendant. He co-operated with *Green* as long as it was practicable. From motives of prudence, and being well aſſured, *O'Halloran* muſt ſucceed, the defendant became more indifferent as to the event of the buſineſs; and when he found, *O'Halloran* was duly inveſted with legal powers to enforce an immediate ſettlement of the ſaid account between him and *Doran*'s eſtate, and payment, and had actually threatened by letter to do ſo, he though it prudent to ſubmit to *O'Halloran*'s authority by an immediate ſettlement; and he (the defendant) ſhortly afterwards informed *Green* of ſuch ſettlement by a letter dated the 12th of *March* 1787; ſtating, that he had received a letter from *O'Halloran*, deſiring him to have the account ready next day; that *O'Halloran* came, and produced his authority from Doctor's Commons, which there was no diſputing with; that the defendant ſaid as much as he could reſpecting the children; that *O'Halloran* declared, he would do ample juſtice to them, but inſiſted upon the defendant's making the ſettlement directly, or he would inſtantly have him arreſted; that, conſidering the conſequence that might be by alarming his creditors, and being ſatisfied of *O'Halloran*'s authority, the defendant was induced, though not without reluctance, to make a ſettlement; though he found, *O'Halloran* had undoubted ſecurities; and that they had juſtified for 5000*l.*; that *O'Halloran* told him, he had given directions for a ſettlement with *Green* without delay; therefore he (the defendant) was afraid, all *Green*'s endeavours, which were from the beſt motives, would not anſwer his expectations; that he (the defendant) ſtood in a very ſingular and dangerous way from the advances he had made: but Mr. *O'Halloran* admitted of them all in the ſettlement; which was but juſtice.

The anſwer then ſtated ſeveral paſſages in letters from *Green* to the defendant, ſhewing, that *Green* was of the ſame opinion as to the inefficacy of the oppoſition and the inexpediency of expoſing themſelves to a ſuit; particularly the following paſſage in a letter, dated the 4th of *July* 1786.

"I cannot at preſent conſent to take a ſhare in the adminiſtra-"tion; leaſt in endeavouring to ſerve Mrs. *O'Halloran* and her "children I ſhould hurt my own family."

This anſwer contained the ſame account as the former anſwers as to the two bonds of *John Graham* and *Tunno*; and it ſtated the account, commencing on the 10th of *March* 1787 to *June* 1792, with *O'Halloran.*

The defendant *John Graham* by his anſwer denied, that he ever received or borrowed from *Simpſon* or any other perſon any money, which to his knowledge or belief was part of the eſtate of *Doran*, or executed a bond or any other ſecurity for the uſe of *Doran*: but he admitted, that in *January* 1785 at the requeſt of *Graham* and *Simpſon* or one of them he gave a bond for 1500*l.* &c. (as ſtated in *Simpſon*'s anſwers); which was delivered up cancelled. No conſideration paſſed at the time: but the defendant was indebted to *Graham* and *Simpſon* to a larger amount.

The defendant *Tunno* put in a ſimilar anſwer with reſpect to his bond for 1500*l.*, ſtated in *Simpſon*'s anſwers.

The anſwer and depoſitions of *Green* confirmed the charges of the bill; and ſtated, that 500*l.* was paid to him by *Simpſon* and *Graham* by a bill of *Martha O'Halloran*, dated the 11th of *July* 1785. Upon the 9th of *July* 1785, they ſent him a ſketch of the account to the 31ſt of *December* 1784; making the balance 3856*l.* 1*s.* 3*d.*; and ſtating, that upon the 20th of *January* 1785 they lent *John Graham* 1500*l.* of that balance; and on the 1ſt of *March* they lent *Tunno* 1500*l.* thereof. *O'Halloran* afterwards acknowledged the loans in converſation. The defendant believes, they had ſent advice thereof to *O'Halloran*; who in a letter to him, dated the 20th of *November* 1785, ſaid, he had written to them, expreſſing his diſapprobation of lending 3000*l.* on private ſecurity; and he believes, they had alſo hinted it to *Doran* in his life, and deſired him on that account not to draw for more than 500*l.* without ſome previous notice, in order to prepare the people; and that the money was lodged in good hands. They (*Graham* and *Simpſon*) wrote to this defendant complaining of *O'Halloran*'s conduct in drawing upon them and not mentioning it in his letters to them; wherefore they ſuffered the bills to be noted. *James Graham* died; and *O'Halloran* drew many bills afterwards. *Simpſon* and his new partner expreſſed their diſapprobation of that and of *O'Halloran*'s character. A letter from *Simpſon* to this defendant ſtated, that their ſolicitor cautioned them not to accept *O'Halloran*'s bills: another letter contained a copy of an opinion of counſel, taken by this defendant and *Simpſon*, that it could not be juſtified, and affirming the children's right to two-thirds of the whole property, both in *England* and abroad, expreſſed their fears of *O'Halloran*'s coming over and getting adminiſtration; "in which caſe the children would loſe all"; and propoſed, in order to ſerve the children, that *Green* ſhould adminiſter, and *Simpſon* join therein. Several meetings took place after *O'Halloran*'s arrival. *O'Halloran* propoſed, that the adminiſtration of *Green* and *Simpſon* ſhould only extend to the effects in *England*; and that 1000*l.* including the 500*l.* paid to *Green* ſhould be ſecured for the uſe of the children in full of all demands. *Simpſon* propoſed in converſation and by letter, that 2000*l.* ſhould be ſettled upon the children, and *O'Halloran* ſhould take the reſt: but this defendant refuſed his conſent; as he values the ſhare of the plaintiffs at 3000*l.* at leaſt. After theſe meetings this defendant thought all matters were amicably adjuſted; that he and *Simpſon* were to have the adminiſtration; and that two thirds of the whole would be ſecured for the plaintiffs; when *O'Halloran* informed him, that he had that morning withdrawn his power of attorney, and entered a *Caveat* againſt their adminiſtration. This defendant wrote to Mrs. *O'Halloran*, charging her not to give adminiſtration to her huſband; and left *London*; believing, that neither *Simpſon* nor himſelf, nor *O'Halloran*, could obtain adminiſtration without her conſent. He received letters from *Simpſon* and *Daviſon*, giving an account of *O'Halloran*'s conduct and intentions; and *Simpſon* appeared the friend of the plaintiffs. About the beginning of 1787 the moſt preſſing letters came from Mrs. *O'Halloran*'s father, intreating this defendant's immediate interference to ſave the plaintiffs from ruin; as *O'Halloran* was ſpending the eſtate, drawing bills, &c. The defendant determined to apply to this court; and about *March* 1787 he went to *London*; and told

told *Simpſon*, he ſhould be made a defendant to a bill intended to be filed on behalf of the plaintiffs; and that he had nothing to do but to deliver in his accounts and abide the deciſion; and that though he had paid a great deal contrary to this defendant's advice, yet this defendant apprehended, he (*Simpſon*) was ſtill within the bounds of ſafety. *Simpſon* ſaid, he wiſhed he had known it a little ſooner; as he had very lately written to *O'Halloran*, that he would no longer oppoſe his getting adminiſtration; that he had received a note from his attorney, informing him, that he apprehended, *O'Halloran* would get the adminiſtration pretty ſoon; and he adviſed this defendant to call upon the attorney; and at the ſame time he ſhewed this defendant the two bonds of *John Graham* and *Tunno*; which he repreſented to be part of *Doran*'s eſtate. This defendant went to the attorney; who informed him, *O'Halloran* could not obtain adminiſtration until the 27th of *March*; upon which the defendant gave orders for filing the bill; and returned to *Briſtol*. He received a letter, dated the 12th of *March* from *Simpſon* (the letter, ſtated in *Simpſon*'s anſwer, acquainting *Green*, that he had ſettled with *O'Halloran*). *O'Halloran* commenced an action againſt this defendant to get the ſum of 500*l.* out of his hands; upon which he paid it into Court under an order made in this cauſe. *O'Halloran* and his wife died before any anſwer was obtained from them, after proceſs to ſequeſtration had iſſued againſt him.

The evidence for the defendant *Simpſon* conſiſted of the depoſitions of his partner and a warehouſe-man as to the account, and the fairneſs of the ſettlement, at the office of his ſolicitor, and after *O'Halloran* had peruſed and examined the account, and as to the tranſfer of the balance, &c.

The Solicitor General, Mr. Richards and Mr. W. Agar for the plaintiffs contended, that the defendant *Simpſon* muſt be anſwerable for two thirds of the ſurplus of the perſonal eſtate of *Doran* upon the foot of the account, dated the 9th of *March* 1787.

Mr. Grant and Mr. King for the defendant Simpſon—Upon the authority of *Utterſon* v. *Mair* (*a*) this bill cannot be ſuſtained. That was the ſtrongeſt poſſible caſe; for all the facts were admitted by the demurrer; *viz.* that the money would be loſt, if it got into the hands of the executor, &c. The courſe is that, which

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(*a*) 4 *Bro. C. C.* 270. *Ante*, vol. 2. 95.

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which was adopted in *Taylor* v. *Allen* (a); where the huſband of the executrix being abroad, and not amenable to the proceſs of the Court, a receiver was appointed, with power to bring actions in the name of the executrix; but no debtor to the eſtate was there called upon. In this caſe *Simpſon* is only a debtor to the eſtate; and the ſtatement is only, that if the money in *Simpſon*'s hands gets into the hands of *O'Halloran*, it will be loſt. The bill is againſt a debtor to the eſtate to oblige him to account without paſſing through the medium of the adminiſtrator, or firſt obtaining an injunction againſt the adminiſtrator, and the appointment of ſome other perſon to receive the property. The prayer of the bill is exactly that in *Utterſon* v. *Mair*; that *O'Halloran* may be reſtrained from getting in the effects: but they did not obtain an injunction. The mere filing of the bill cannot have that effect. A mere notice to the debtor not to pay is not ſufficient. An injunction is neceſſary. The debtor therefore was ſafe in paying to the adminiſtrator. Certainly it would have been proper in him to have delayed it as long as poſſible: but the queſtion is, whether any thing made it incompetent to him to make the payment or a ſettlement of the account with *O'Halloran*. There is nothing in this caſe to take it out of thoſe deciſions. Though it is not eaſy perfectly to juſtify the conduct of this defendant, it has been exaggerated. If he could be conſidered in another light than as a mere debtor, ſtill he is not reſponſible in the degree, in which this bill attempts to affect him.

Solicitor General in reply—The application of *Utterſon* v. *Mair* to this caſe cannot hold. The ground of allowing the demurrer was, that the plaintiff ought to have applied under the bankruptcy, or to have filed a bill againſt the inſolvent executor. In *Newland* v. *Champion* (b) Lord *Hardwicke* conceived, that there is no doubt, under circumſtances this ſort of bill may be filed. Agents or truſtees have frequently been made parties to bills by creditors; ſtill more ſo, upon a bill by perſons in the ſituation of the plaintiffs, entitled to two-thirds of the ſurplus, and filing a bill to have that ſurplus ſecured, in conſequence of the condition of the perſon, who obtained letters of adminiſtration. But in this inſtance the undertaking was by *Simpſon* himſelf; for he had ſaid, the property ought to be ſecured; and that he ſhould not pay it to *O'Halloran*. It was entirely by the fraud of *Simpſon* that *O'Halloran* was enabled to poſſeſs the money. There is a caſe of fraud againſt *Simpſon;* by which he was contriving to prevent the plaintiffs from having the benefit of the ſuit they intended to inſtitute, and to prevent the injunction from iſſuing againſt *O'Halloran.* There is no truth in his four firſt anſwers: but in the fifth the contrivance appears to enable him to retain the money in his hands under colour of accounting with *O'Halloran*, and to cover the payments made to him. By the conduct of *Simpſon* the bill againſt him as agent and truſtee is fully juſtified. He was truſtee as to the bonds of *John Graham* and *Tunno*.

(a) 2 *Atk.* 213.

(b) 1 *Veſ.* 105.

Lord Chancellor—The objection made to this bill is, that a ſuit cannot be maintained on behalf of the next of kin, entitled to a diſtributive ſhare of an inteſtate's eſtate, againſt a debtor to the eſtate, who has arranged his debt with the adminiſtrator; and that objection is ſupported by a caſe, in which to a bill by a creditor of a bankrupt upon a debt accrued ſubſequent to the bankruptcy againſt the aſſignees in reſpect of the ſurplus a demurrer was allowed. In the caſe of a creditor or of next of kin, if they can ſtate a caſe, that the repreſentative is colluding with the debtors to the eſtate, and diminiſhing the fund, they have a right upon that ground of colluſion to make the debtor a party, to obtain a diſcovery, and upon that diſcovery to attach upon the money, and to prevent the payment of the money or a ſettlement of the account by colluſion between the repreſentative and the debtor. The authority of Lord *Hardwicke* in that caſe cited from *Veſey* has, I believe, been ſupported by a vaſt number of caſes; where it has been neceſſary for a party, intereſted either as creditor, or as being entitled to a diſtributive ſhare of the perſonal eſtate, not to permit the adminiſtration to go on abuſively or colluſively between the repreſentative and a perſon, who is indebted to the eſtate.

But Mr. *Simpſon* is in a very different ſituation from that of a debtor to the eſtate. He was agent to the inteſtate. According to the account he gives himſelf he had placed out the effects of the inteſtate, uſing the power and confidence placed in him, in two ſecurities by bond; of which he had given notice to the principal; upon which bonds he had carried on in his accounts the intereſt, as paid upon thoſe bonds to the eſtate of *Doran;* upon which he charged

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charged commiſſion as agent, as for money placed out upon a loan; and after the death of *Doran* he repreſents it to thoſe acting for the children as a ſpecific part of the eſtate of *Doran* ſecured upon theſe bonds; for which he was reſponſible. It is in vain for him now to ſay, all this is falſe; that he had not lent the money of *Doran*, and taken the bonds as due to that eſtate; but that he thought fit at the date he mentions to make two debtors to him give bonds, and to repreſent, that theſe ſecurities were taken for *Doran*'s eſtate. They ſwear certainly, that they knew nothing of it; that they were ſimply bonds given to *Simpſon;* and he gave them back cancelled; therefore they are diſcharged; as they certainly are: but I muſt hold him to the duty, according to the ſituation, in which he placed himſelf, by the repreſentations he made, both to *Doran*, and after his death to thoſe acting for the children; upon which they were about to take meaſures for ſecuring the property.

Then after the arrival of *O'Halloran* in *England*, I ſhall not detail the circumſtances: but the whole makes up a caſe of colluſion between them for an intereſted purpoſe. The intereſt is extremely obvious. *Simpſon* manages, that *O'Halloran* ſhall get out adminiſtration at a particular date; knowing the intention of thoſe acting for the children to file a bill to prevent him from receiving the produce and leaving *England* with it. Upon the 9th of *March* 1787 *Simpſon* ſettles, as he calls it, with *O'Halloran*. What is it he ſettles? He had, very imprudently, holding out different colours to *Green*, ſuffered *O'Halloran* to draw upon him, when he had no right to draw. He had involved himſelf to the amount of 600*l.* with *O'Halloran*. It is clear *Simpſon* knew his circumſtances; that he was not fit to be truſted with the adminiſtration of property, in which others were intereſted, if it could be prevented. He talks of meaſures intended to be taken againſt him by *O'Halloran;* that *O'Halloran* threatened to arreſt him. He might have arreſted him: but the arreſt would have been vain. It might have been fruſtrated upon application to a Judge. *O'Halloran* was indebted to him in a larger ſum than could have been poſſibly ſtated as due to him; for theſe two bonds would have been ſufficient to have ſatisfied any thing due to the eſtate of *Doran*. Upon a repreſentation of the circumſtances by *Simpſon* the repreſentatives of *Doran* would have been ſtopped immediately from making any demand againſt him. Then what is the farther caſe? If the whole caſe had been diſcloſed, it would have been the duty of *Simpſon* to have had the money paid into Court. Inſtead of making any actual payment of money, he reimburſes himſelf for all the bills, which he ſuffered *O'Halloran* to draw without any right to draw; bills for ſmall ſums at long dates; with all the advantage ariſing from the negotiation of the money: 750*l.* remained in his hands from 1792 without any production or account of it.

Upon theſe grounds of a fraudulent and intereſted colluſion with *O'Halloran*, which has produced a loſs to the eſtate, I muſt hold *Simpſon* accountable, as he would have been, if the truth of the caſe was, as he repreſented it, *viz.* that the bonds had been ſtanding out due from thoſe obligors. They would have been part of the ſpecific eſtate, for which *Simpſon* was a truſtee. For that he is anſwerable: but at the ſame time he is only anſwerable for what would have been the ſhare of the children.

Direct an acount of the perſonal eſtate of *Doran* againſt the defendant *Simpſon*; and an enquiry, what is the amount of the ſhare of the children; *viz.* two thirds of the ſurplus; and declare, that the defendant *Simpſon* is anſwerable for that, with coſts.

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May 30.
June 3. 16.

Specific performance refuſed on the lacheſs and trifling conduct of the plaintiff; the contract being for a ſale to the plaintiff under a bankruptcy of a reverſionary intereſt for life; which in the interval fell into poſſeſſion. The defendants having alſo been in ſome degree remiſs, the bill was diſmiſſed without coſts upon delivering up the agreement.

THE bill was filed for a ſpecific performance of an agreement for the purchaſe from the defendants, the aſſignees of *Thomas Porter Banner*, a bankrupt, of a reverſionary intereſt of the bankrupt for his life in the rents and profits of certain eſtates, *viz.* a freehold farm at *How* in *Yorkſhire*, expectant upon the death of either of two perſons, and a freehold eſtate at *Oſwaldkirk* in *Yorkſhire*, expectant upon the death of certain perſons and the failure of iſſue male of one of them.

The circumſtances, under which this bill was filed, were theſe. The bankruptcy happened in *May* 1792. The defendants employed the plaintiff as an auctioneer to ſell the bankrupt's reverſionary intereſt in the eſtates in *Yorkſhire*. At their requeſt he went to *Yorkſhire* for the purpoſe of getting the neceſſary information, in order to prepare the particular. The bankrupt's intereſt in theſe eſtates was put up to ſale the 31ſt of *January* 1793: but it was not ſold. The plaintiff then offered to purchaſe it himſelf for 1000*l.*; which offer was accepted by a letter, dated the 5th of *February* 1793. The abſtract was delivered upon the 3d of *July* 1793; and was laid before Mr. *Sidebotham* on behalf of the plaintiff; and ſeveral objections were made to it; in conſequence of which a correſpondence took place between the ſolicitors of the parties; and endeavours were uſed to procure farther information.

The defendant's ſolicitors wrote to the ſolicitor for the plaintiff, incloſing a letter, which, they ſay, he will ſee, has furniſhed every particular, that can be procured; and this they hope will prove ſatisfactory; and deſire an anſwer by *Saturday* or *Monday*. By a letter to them from the plaintiff's ſolicitor, dated the 19th of *October*, he informs them, that the abſtract of the title has been again laid before Mr. *Sidebotham*, and is tranſmitted with further inquiries pointed out by him. By a letter, dated the 16th of *December*, from the ſolicitors for the defendants to the plaintiff's ſolicitor they ſay, they are deſired by the aſſignees to requeſt, he will immediately inform them, whether his client intends completing the purchaſe, or not. By another letter, to the plaintiff, dated the third of *January* 1794, they ſay, they are again deſired by the aſſignees to acquaint him, that the title they have offered, and which they are ready to give him, is the beſt they can make, and ſuch as is preſumed to be ſufficient; therefore they requeſt to be immediately informed, whether he will accept ſuch title, or not; as it is neceſſary, ſomething effectual ſhould now be done therein. The plaintiff's ſolicitor by a letter, dated the 7th of *January* 1794 to the ſolicitors for the defendant, ſays, he is directed by Mr. *Spurrier* to ſay, he is now ready, as he has always been, to complete his purchaſe upon having a good title made out to him; that it is between two and three months ſince the abſtract was ſent to them the laſt time: he refers them to the letter he then wrote; and ſuggeſts, that there would be no great difficulty in anſwering the queries and remarks of Mr. *Sidebotham*; that Mr. *Spurrier* waits a ſpeedy return to him of the abſtract with the neceſſary information and particulars in ſatiſfaction of thoſe queries and remarks; ſo that the buſineſs may be no longer delayed.

The following notice in writing, dated *January* the 21ſt 1797, and ſigned by the defendants, was ſerved upon the plaintiff:

"In the matter of *Thomas Porter Banner*, a bankrupt.

"Sir,

"We do hereby again give you notice, that unleſs you do "within one week from the date hereof make good and complete "your purchaſe of the reverſionary life intereſt of the ſaid bankrupt in divers freehold eſtates in the county of *York*, long ſince "contracted for, upon ſuch title being given you, as we always "offered, and can only give, the ſame will be ſold to another "purchaſer; who is ready and willing to take the ſaid eſtate upon "ſuch title being given him by us."

The plaintiff ſent the following anſwer, dated *Yardleſbury*, the 26th of *January* 1797:

"Sir,

"The letter ſigned by yourſelf and brother aſſignees of Mr. "*Banner*, and dated the 21ſt inſtant, reached me here yeſterday. "In anſwer I beg leave to ſay, that I ſhall be in town on *Saturday* "evening; and will call upon you on *Monday* forenoon; when I "hope, and doubt not, that ſome mode may be hit upon for the "concluſion of the buſineſs in queſtion, that will be at once "equitable and agreeable to us all."

By a letter, dated the 20th of *February* 1797, from the ſolicitors for the defendant to the plaintiff, they ſay, they are deſired by the aſſignees to acquaint him, that they cannot longer delay the concluſion of the ſale of the reverſionary intereſt in the bankrupt's eſtate purchaſed by him long ſince; and unleſs the ſame is fully compleated by *Friday* next, they ſhall be under the neceſſity of diſpoſing of the ſame for the like ſum to another perſon; and by a poſtſcript they added, that the aſſignees deſire them to inform him, that they do not intend to take a ſhilling leſs for the ſaid eſtate than he was originally to give; and therefore any farther meetings on that ſubject are wholly unneceſſary (*a*).

(*a*) This alluded to ſome deficiency of the eſtate with reſpect to meaſure.

The plaintiff's ſolicitor by a letter, dated the 20th of *February* 1797, to the ſolicitors for the defendants, ſays, that in anſwer to their letter of that day to Mr. *Spurrier* he is directed to ſay, that *Spurrier* is deſirous of completing the purchaſe on having a good title made to him; and that to enforce its completion with ſuch a title he now conſiders himſelf reduced to the neceſſity of filing a bill againſt them, and will accordingly do ſo.

The bill was filed upon the 8th of *April* 1797; and at a meeting of the creditors of the bankrupt upon the 13th of *April* the defendants were ſerved with a *Subpæna* to anſwer. The anſwers were put in upon the 14th of *July* 1797. The replication was filed in *Trinity* Term 1798 after notice of a motion to diſmiſs the bill for want of proſecution; and upon the 12th of *July* 1798 an order was obtained to amend the bill; which ſtated only, that the plaintiff agreed to purchaſe Lot 2: *viz.* the *Oſwaldkirk* eſtate; and the anſwer admitted the agreement, as ſtated in the bill. The *Subpæna* to anſwer the amended bill was returnable the 27th of *July*; and the anſwer was ſworn upon the 7th of *November*, admitting the agreement as to both lots. *William John Banner*, one of the lives, upon the determination of which the reverſionary intereſt of the bankrupt was expectant, died upon the 15th of *Auguſt* 1797. *Arthur Dogget Banner*, the only remaining life, died upon the 5th of *June* 1798. Upon the death of the former the defendants in right of the bankrupt became entitled to the poſſeſſion of one ſixth part of the premiſes, which were the ſubject of the contract; and upon the death of the other, to the whole. The plaintiff inſured the life of the bankrupt; who was about the age of thirty-ſix, and healthy. The farther anſwer ſtated, that the rents and profits of the premiſes amounted to 6 or 700*l.* a-year, and the bankrupt's life eſtate was worth about 8000*l.* In 1795 the bankrupt himſelf offered to purchaſe the intereſt of the aſſignees, with the title they had, for the ſame price, at which the plaintiff had agreed to take it.

On the part of the plaintiff was produced a correſpondence between his ſolicitor and ſeveral perſons in *Yorkſhire*, with a view to procure information as to the title, beginning on the 22d of *June* 1795, and ending on the 17th of *November* 1796.

Mr. Richards and Mr. Stanley for the plaintiff contended, that he was entitled to a ſpecific performance; and they relied on *Mortimer* v. *Capper* (*a*) and *Jackſon* v. *Lever* (*b*) as authorities, that the alteration of circumſtances by the dropping of the lives could make no difference.

Mr. Lloyd Mr. Grant and Mr. Pemberton for the defendants—Upon this ſubject a Court of Equity attends to equitable circumſtances; as, whether the plaintiff has acted fairly, and ſo as to entitle himſelf to relief. After the trifling conduct of the plaintiff, and his delay, upon a ſubject of this nature a contract for the ſale of a reverſionary eſtate for life, which ought to have been immediately executed, and under this change of circumſtances, he cannot have a decree: *Newman* v. *Rogers* (*c*). In *Hayes* v. *Caryll* (*d*) it was held, that where a party has trifled, Equity will not decree a ſpecific performance in his favor; eſpecially, if the circumſtances are altered. In *Mortimer* v. *Capper* there was no remiſſneſs or backwardneſs: yet even in that caſe a ſpecific performance was not decreed in the firſt inſtance; but the defendant afterwards ſubmitted to what appeared to be the opinion of the Court. In *Jackſon* v. *Lever* there was no remiſſneſs whatever, or reluctance to perform the contract.

In this caſe the plaintiff was very active, when it was his intereſt to be ſo. There is the ſtrongeſt contraſt between his previous and ſubſequent conduct. The motion to diſmiſs the bill was made as ſoon as it could be by the courſe of the Court. What the Lord Chancellor ſays in *Newman* v. *Rogers* applies cloſely to theſe defendants, the aſſignees of a bankrupt, and to this ſubject, a reverſionary life eſtate. The delay was moſt detrimental. There was no agreement binding the plaintiff.

Mr. Richards in reply—*Newman* v. *Rogers* applies much leſs than the caſes, that have been cited for the plaintiff. The circumſtance of not paying the money at the day does not vitiate the

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(*a*) 1 *Bro. C. C.* 156.
(*b*) 3 *Bro. C. C.* 605.
(*c*) 4 *Bro. C. C.* 391.
(*d*) 5 *Vin.* 538; 1 *Bro. C. C.* 27.

contract (*a*). Every caſe of this kind muſt depend upon it's circumſtances. In *Newman* v. *Rogers* the money was to be paid at a particular time; and the agreement was peculiar; containing many articles and ſtipulations. The delay of the plaintiff in this caſe aroſe from the miſtake in the bill; which made an amendment neceſſary; and the defendants were alſo negligent. What were they about? It is impoſſible to ſuppoſe, that the plaintiff was not bound equally with the defendants.

Maſter of the Rolls—The queſtion is, whether upon this bill and the mode, in which the cauſe has been conducted, and brought to a hearing, the plaintiff is entitled to a ſpecific performance of this agreement. The reverſionary intereſt of the bankrupt in theſe eſtates muſt undoubtedly from the circumſtances, in which he was, be brought to an immediate ſale. Reverſionary intereſts are not things, that in general produce a good price; and nothing but the ſituation, in which the defendants ſtood, as aſſignees of a bankrupt, would tempt them to put this intereſt up to ſale. They did ſo; and they employed this plaintiff as an auctioneer; and I admit, an auctioneer is not to be ſuppoſed converſant with titles: but with regard to the value I muſt ſuppoſe him as converſant as any man, from the habits of his buſineſs. He was not able to procure ſuch a ſale as was ſatisfactory to the defendants; and then he enters into this agreement for the purchaſe of it himſelf; and upon the 5th of *February* 1793 this agreement was concluded by him; who muſt be ſuppoſed to have full knowledge of the value. It is ſaid there was nothing binding upon the plaintiff: but his ſubſequent conduct was certainly equivalent to an acceptance; and he became bound equally with the defendants; but upon this implied condition, as every man is, that the juſtice of a Court of Equity ſhall not be extended to compel any party to pay the purchaſe money, unleſs he has a title in the opinion of the Court perfectly free from objection, or at leaſt, free from all reaſonable objection (*b*). Therefore the defendants were in this ſituation; that the plaintiff could enforce the contract

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(*a*) As to the materiality of the time with reference to the performance of a contract, ſee *Lloyd* v. *Collett*, 4 *Bro. C. C.* 469. Mr. *Sanders's* note to *Gibſon* v. *Patterſon*, 1 *Atk.* 12. *Forreſt* v. *Elwes*, *ante*, 492. and *Harrington* v. *Wheeler*, *poſt*. For the general principles, by which the diſcretion of the Court is regulated in enforcing or reſcinding agreements, ſee *Calverly* v. *Williams*, and *Calcraft* v. *Roebuck*, *ante*, vol. 1. 210. 221.

(*b*) *Shapland* v. *Smith*, 1 *Bro. C. C.* 75. *Cooper* v. *Denne*, 4 *Bro. C. C.* 80; *ante*, vol. 1. 565.

againſt them, and they could not enforce it againſt him without making a good title. The queſtion is, whether he has proceeded, as he ought. Immediately he ought to have inquired into the title; and if it was not ſuch as he liked, he ought to have ſaid, either that he would take it, or not. The abſtract was delivered upon the 3d of *July* 1793. To this, it appears, ſeveral objections were taken; and I muſt take it now, that they were juſt objections; for they were not cured in 1797, and are ſtill inſiſted on. To the letter of the 16th of *December* 1793 from the ſolicitors for the defendants no anſwer whatever was given. By the letter of the 3d of *January* 1794 he again receives notice from theſe defendants, the aſſignees of a bankrupt, ſelling a reverſionary intereſt, the life wearing out, and with the chance of an eſtate tail intervening, that the title they have offered is the beſt they can make, and deſiring him immediately either to accept or reject it. The anſwer to that is the letter of the 7th of *January*; ſaying, that the plaintiff is ready to complete his purchaſe upon having, not ſuch title as they can make, but ſuch a title as the Court of Chancery will approve; that is, inſiſting upon a better title.

From that time there is a conſiderable chaſm. It does not appear, whether any thing paſſed, except that they were endeavouring to obviate theſe objections; for in 1795 Mr. *Sidebotham* ſeems to think, that his objections may be waived, provided certain inquiries were made. The application is renewed in *January* 1797. It is aſked, what were the defendants about? They had brought themſelves into a ſtrange ſituation. If they had filed their bill, they would have ſucceeded, I believe, in getting the contract reſcinded: but they muſt have paid the coſts; for they had brought themſelves into this ſtrange ſituation: they had entered into a contract to ſell an eſtate: but they were not able to make a good title. Therefore they rather wiſhed to prevail upon the plaintiff to give it up than to incur this great expence of a ſuit in Chancery.

The notice, dated the 21ſt of *January* 1797, is to complete the the purchaſe within a week upon the title originally offered, or that the eſtate will be ſold to another perſon. In anſwer to that the plaintiff ſays, that when he comes to town, he hopes ſome mode may be hit upon for the concluſion of the buſineſs; not then accepting the title. By the letter of the 20th of *February* 1797 the defendants fix *Friday* next; and they apprize the plaintiff, that they will not abate any thing in the price on account of a difference of meaſure. At this time the two lives were in being. To that letter he writes an anſwer the ſame evening; ſtating, that he is deſirous of completing the purchaſe on having a good title; and to enforce its completion with ſuch title he muſt file a bill. After having taken three years, before he would give any poſitive anſwer, whether he would take the title they could make, he reſorts to the original right he had, and will not give it up. I muſt ſuppoſe, the objections to the title were good: otherwiſe he ought to have taken it without putting them to all this expence. He had this advantage; that if the lives dropped, he might have ſaid, he would take it. Even after the laſt letter nearly two months elapſed, before the bill was filed. The anſwer was put in in three months; which is but a ſhort time for aſſignees to put in an anſwer. Why did he not reply immediately? It is ſaid, there was a blunder in his bill. He might have found that out. Then he ſleeps a year; and then they compel him to go on by moving to diſmiſs the bill; and they ſay, that was done as ſoon as by the courſe of the Court it could be. Then he files a replication; and then found a miſtake in his bill. In the meantime an important circumſtance had taken place; the lives having dropped; and then he begins to be in earneſt in it.

Is this a caſe, in which the plaintiff is entitled to the extraordinary interference of this Court? There is one circumſtance: he has kept up the inſurance of the bankrupt's life; which is ſo much money thrown away. He may ſtill bring an action; if he thinks, he can recover. He ought to have made up his mind long before. The only doubt I have is, whether this bill ought not to be diſmiſſed with coſts. The defendants might have brought it to an iſſue much ſooner. I am clear, the bill muſt be diſmiſſed: but I am inclined to diſmiſs it without coſts, the plaintiff delivering up the agreement.

After the cauſe had ſtood over a few days the bill was diſmiſſed; with coſts, unleſs within a month the plaintiff ſhould deliver up the agreement; and in that caſe, without coſts.

1799.

June 7.

CHAMBERS *v.* MINCHIN.

Legacy of 2400*l.* in the 5 *per cent.* Conſolidated Bank Annuities: decreed, that 2400*l.* 5 *per cent.* Annuities, *viz.* Navy Bills, ſhould be purchaſed; evidence of the intention and miſtake as to the fund being rejected.

LUCY RUSSELL by her will, after declaring, that as to the worldy eſtate ſhe was poſſeſſed of ſhe gives as follows, gave to *William Minchin* and *William Green* 1000*l.* upon truſt to lay the ſame out upon Government or other ſecurity, upon certain truſts. The will then proceeded thus:

"I alſo give and bequeath to *William Minchin*, of *New-Inn*, "*London*, and *William Green* of *Baſingſtoke* aforeſaid, gentlemen, "a farther ſum of 2400*l.* in the 5 *per cent.* Conſolidated Bank "Annuities, in truſt to the uſes following:"

The will then declared the truſts, *viz.* in the firſt place to pay and apply the intereſt and proceeds of one moiety thereof unto and between the teſtatrix's couſins Mrs. *Jane Snook* and Mrs. *Elizabeth Clarke* in equal proportions during their joint lives; and upon the death of either of them then to pay the whole intereſt of the ſaid moiety to the ſurvivor for life; and to pay and apply the intereſt and proceeds of the other moiety of the ſaid ſum of 2400*l.* unto *John Chambers* of *Baſingſtoke*, until his daughters reſpectively attain their ages of twenty-one years; and from and after the deceaſe of the ſurvivor of *Jane Snook* and *Elizabeth Clarke* the teſtatrix gave and bequeathed the intereſt of the ſaid other moiety in like manner unto the ſaid *John Chambers*, until his ſaid daughters ſhall reſpectively attain their ages of twenty-one years; and when and as each of them ſhall attain ſuch age, ſhe directed, that a proportionable part of the ſaid moiety of 2400*l.* ſhall be transferred into the name of each of them upon attaining ſuch age reſpectively; and upon the deceaſe of the ſurvivor of them, the ſaid *Jane Snook* and *Elizabeth Clarke*, provided they ſhall have attained ſuch age, as aforeſaid, then a proportionable part alſo of the other moiety to be in like manner transferred to each of them reſpectively upon their attaining ſuch age, as aforeſaid; and in caſe of the death of either of the daughters of the ſaid *John Chambers* before the age of twenty-one years ſhe directed, that the ſhare of her or them ſo dying ſhall go to and be equally divided among the ſurvivors upon attaining their reſpective ages of twenty-one years, as aforeſaid. The teſtatrix then, after giving ſome ſpecific and pecu-

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niary legacies, diſpoſed of the reſidue; and appointed *Minchin* and *Green* her executors.

The bill was filed againſt the executors by *John Chambers* and his children; praying in the alternative, either that the ſum of 2400*l.* ſhould be laid out in 5 *per cent.* Annuities, or that ſo much money ſhould be laid out as would purchaſe 2400*l.* capital ſtock in the 5 *per cent.* Bank Annuities.

It appeared by the anſwer, that the only ſtock, which the teſtatrix had at the time of her death, was 156*l. per ann.* Long Annuities. The defendants ſubmitted, whether the ſum of 2400*l.* 5 *per cent.* Navy Bills or Victualling Bills ought to be purchaſed.

The defendants went into evidence of the intention, and to ſhew, that there was a miſtake in the will as to the fund, but the Lord Chancellor would not permit it to be read.

The Solicitor General and Mr. Martin for the plaintiffs—The anſwer of the defendants is an extraordinary one; and contains what could not be given in evidence. The only queſtion is, whether the plaintiffs are not entitled to have 2400*l.* laid out in 5 *per cent.* ſtock, or to have 2400*l.* 5 *per cent.* ſtock purchaſed. The ſum 2400*l.* is intended to be given. As to the firſt legacy of 1000*l.* there is a general power of laying that out in any fund. As to the 2400*l.* the conſtruction muſt be, that ſhe meant that ſum to be paid: but for the benefit of thoſe intereſted in it for life ſhe meant it to be laid out in 5 *per cent.* Annuities, and not in any other fund. Either the ſum of 2400*l.* is given, to be laid out in a particular fund, or a ſum to the amount of 2400*l.* of a particular fund is given. Whether the legacy is accurately deſcribed, or not, if the Court ſees the intention, it will be adopted. There are 5 *per cent.* Bank Annuities; though they are not conſolidated. It is true, they are ordinarily called Navy Annuities: but they are payable at the Bank.

Attorney General for the defendants—The doctrine of *Fonnereau* v. *Poyntz* (*a*) ought to be applied to this caſe; and there being no ſuch fund as that deſcribed, evidence ought to be admitted.

(*a*) 1 *Bro. C. C.* 472.

The defendants ſay, the deſcription comes as near Bank Long Annuities as any thing elſe; and being poſſeſſed of 156*l. per ann.* Long Annuities, ſhe muſt be underſtood to intend to give of thoſe Long Annuities ſo much as will produce 120*l. per annum.*

Lord Chancellor—Is not the rule quite ſettled, that, where a teſtator gives ſtock, which he does not poſſeſs, the legatee is entitled to have the ſtock purchaſed? I cannot doubt about it. There is a long limitation over upon this legacy, that does not apply well to a Long Annuity. There is no other 5 *per cent.* fund but the Navy Annuities. The whole deſcription is not true. There are public funds, 5 *per cent.* Annuities.

The decree declared, that it was the intention of the teſtatrix, that 2400*l.* 5 *per cent.* Annuities in the public funds ſhould be purchaſed; and that the truſts ſhould be declared according to the will. The uſual accounts were directed; and in caſe of a deficiency of aſſets the legatees to abate in proportion, &c. (*a*).

(*a*) See *Selwood* v. *Mildmay*, *ante*, vol. 3. 306.

Ex parte CLARKE.

June 8.

Separate creditors having received twenty ſhillings in the pound are not entitled to intereſt out of the ſurplus of the ſeparate eſtate, until the joint creditors are paid twenty ſhillings in the pound.

UPON a joint commiſſion of bankruptcy, with the uſual order for keeping diſtinct accounts of the ſeparate eſtate of each partner, the ſeparate creditors of one of them having received twenty ſhillings in the pound preſented the petition; praying for intereſt upon their debts out of the ſurplus of the ſeparate eſtate.

The joint creditors had not received twenty ſhillings in the pound.

The Solicitor General and Mr. Cooke for the petition—The ſeparate creditors are entitled to intereſt out of the ſurplus. The bankrupt himſelf cannot call for any part of the property, until the ſeparate creditors are paid both principal and intereſt: *Bromley* v. *Goodere* (*a*); and though that caſe is only an authority againſt the bankrupt himſelf, the ſame principle extends to the joint creditors; who can only ſtand in his place, and claim, what he could claim.

(*a*) 1 *Atk.* 75. *Ex parte Mills*, *ante*, vol. 2. 295.

If there had been both a joint and a ſeparate commiſſion, it would have been impoſſible for the aſſignees under the joint commiſſion to have eſtabliſhed a claim againſt the aſſignees under the ſeparate commiſſion, till the ſeparate fund had been fully diſtributed among the ſeparate creditors.

Attorney General for the aſſignees—The rule, that has been acted upon for many years, is directly again this claim. The preciſe point was determined by Lord *Thurlow* in 1786 in *Ex parte Boardman* (a).

Lord Chancellor—The caſe of the creditors is very different from that of the bankrupt. They are *creditors*.

Diſmiſs the petition.

(a) *Cooke's Bankrupt Laws*, 183.

June 8.

Ex parte AYNSWORTH.

Under an agreement to take off a diſcount above 5 *per cent.* for prompt payment, though according to the cuſtom of the trade, the creditor cannot upon failure charge more than 5 *per cent.*

Berrington, *Marſh*, *William Horton* and *John Horton*, carried on buſineſs in partnerſhip as cotton manufacturers until *March* 1797; when they became bankrupt.

In 1796, ſhortly after they commenced buſineſs, they agreed to bleach their goods with the petitioners, who were bleachers in the county of *Lancaſter*, upon theſe terms; that the petitioners ſhould ſend in their running account at the end of every three months; and if the bankrupts ſhould pay immediately, then the petitioners agreed to deduct by way of diſcount and damages out of the account ſo ſent in after the rate of 30½ *per cent.* for ſuch prompt payment.

Under this agreement the accounts were regularly ſent in, and paid, up to the 1ſt of *October* 1796; when the account for the preceding three months was ſent in, amounting to 379*l.* 13*s.* 7½*d*; for which the petitioners could not obtain payment. They continued however to bleach for the bankrupts till the latter end of *December* following. Their demand from the 1ſt of *October* to the end of *December*, when they ceaſed to bleach for the bankrupts, amounting to 409*l.* 15*s.* 10½*d.*; of which no account had been then delivered.

The Commiſſioners refuſed to allow more than 5 *per cent.* diſcount under the agreement for the accounts remaining unpaid; upon which the petition was preſented; praying, that the petitioners may be admitted creditors for the ſurplus diſcount according to the agreement.

The petition was ſupported by affidavits of eminent bleachers as to the cuſtom of the trade to allow large diſcounts, *viz.* 20, 25, and 30 *per cent.*

Mr. C. Agar for the petition—There is no ground to imagine, a loan was intended to be covered by this contract. Two or three payments were made promptly; by which the petitioners performed their part; and by the nature and ſubſtance of the contract the idea of a loan is negatived. To make a contract uſurious there muſt be a loan of money, wares, merchandize, or other commodities, to be repaid or reſtored to the lender with higher intereſt than the Statute (*a*) allows. This is the very reverſe of uſury, *viz.* a contract to take leſs than the real debt, in order to accelerate the payment rather than give time for it. It is not uſury to reſerve greater intereſt than the law allows, where the borrower has it in his power to repay the principal without intereſt at a time certain; for uſury is an agreement originally to pay the principal with intereſt above 5 *per cent.* If it is not uſury, there is no reaſon, why the bankrupts ſhould not be bound by their contract according to the courſe of their trade. There is no doubt, a greater diſcount than 5 *per cent.* is allowed between traders. *Floyer* v. *Edwards* (*b*) goes farther than this. It is like the caſe of a compoſition: *Ex parte Bennet* (*c*).

The Counſel for the aſſignees were ſtopped by the Court.

LORD CHANCELLOR—That trade of a gold-refiner, upon which *Floyer* v. *Edwards* aroſe, has been turned into a cover for uſury. The cuſtom of the trade cannot make the debt more than the money really advanced with 5 *per cent.* The creditor cannot have more than 5 *per cent.* The Commiſſioners have done right.

Petition diſmiſſed.

(*a*) 12 *Ann. ſt.* 2. *c.* 16.

(*b*) *Cowp.* 112.

(c) 2 *Atk.* 527. *Sewell* v. *Muſſon*, 1 *Vern.* 210; 1 *Eq. Ca. Abr.* 28, *pl.* 3. *Heathcote* v. *Crookſhanks*, 2 *Term Rep. B. R.* 24.

1799.

Rolls.
June 10.

PRICE *v.* PAGE.

Legacy to Price the ſon of Price: upon the evidence the plaintiff, the only claimant, was declared entitled.

THOMAS BELL by his will, after ſome legacies, gave to Price the ſon of Price the ſum of 100*l.*

The teſtator died in 1794. The bill was filed for the legacy of 100*l.* No other perſon claimed it.

In ſupport of the plaintiff's claim evidence was read; from which it appeared, that he was the ſon of a niece of the teſtator; that his father's and grandfather's name was *Price;* that the teſtator had no other relation of that name; that he lived on terms of affection with the plaintiff, contributed to his maintenance, placed him with an attorney, and paid the duty on that occaſion; and that the teſtator ſaid, he had or would provide for the plaintiff, and that he had left him ſomething by his will.

Mr. Holliſt and Mr. Raynsforth for the plaintiff were ſtopped by the Court.

Mr. W. Agar for the defendants, the executors—The reſiduary legatees are not ſatisfied of the plaintiff's right. The queſtion is, whether he or his father is intended. It has been determined, that a legacy to Lady is void (*a*).

Maſter of the Rolls—That is quite a different caſe. This is only, that the teſtator did not know the *Chriſtian* name. I am perfectly ſatisfied by this evidence: but if the executors inſiſt upon an inquiry and an advertiſement, they muſt have it: but after this evidence and the length of time, that has elapſed without any other claim, there can be no doubt. The plaintiff's father can have no claim. There is poſitive evidence, that the teſtator contributed to the plaintiff's maintenance, placed him with an attorney, ſaid, he would provide for him, and had left him ſomething by his will.

An inquiry not being preſſed, the decree declared the plaintiff entitled to the legacy of 100*l.* (*b*).

(*a*) *Hunt* v. *Hort*, 3 *Bro. C. C.* 112.

(*b*) See *Abbot* v. *Maſſie*, *ante*, vol. 3. 148. and *Parſons* v. *Parſons*, *ante*, vol. 1. 266.

——— *v.* LEADBETTER.

June 12.

A work alleged to be a piracy referred to the Maſter.

An injunction had been obtained to reſtrain the defendant from publiſhing a work alleged to be pirated from a work of the plaintiff's, conſiſting partly of ſelections from hiſtories and tours through *Wales*, and partly of obſervations.

Upon ſhewing cauſe againſt diſſolving the injunction upon the coming in of the anſwer the Solicitor General ſaid, it muſt be determined by compariſon; and for that purpoſe it muſt be referred to the Maſter, as in *Carnan* v. *Bowles* (*a*) to ſee, whether they are the ſame compilation.

Lord Chancellor made the order accordingly.

(*a*) 2 *Bro. C. C.* 80.

CROMPE *v.* BARROW.

Rolls.
June 16.

An appointment exceeding the power by a limitation to objects not within the power is void as to the exceſs; as where the power is to appoint to children, and the appointment is to a child for life, and after his deceaſe to his wife and children: but that void limitation ſhall not defeat a limitation over to an object of the power, in caſe ſuch child dies without leaving a wife or child ſurviving.

By ſettlement, dated the 17th of *April* 1796, made previouſly to the marriage of *John James* and *Mary Barrow*, widow, a leaſehold houſe in *Tottenham-Court-Road*, of which *Mary Barrow* was poſſeſſed for a long term of years, and a bond to her, for ſecuring 2000*l.* and intereſt, were aſſigned to truſtees, upon truſt, after the marriage, ſubject to a bond debt of 150*l.* due by *Mary Barrow*, to receive the rents and intereſt, and to pay the ſame or permit the ſame to be received by *Mary Barrow* for her life for her ſeparate uſe and benefit; and after her deceaſe, then upon truſt, that the truſtees ſhould ſtand poſſeſſed of the ſaid meſſuage or tenement and of the ſaid bond thereby aſſigned, and the money due thereon, for all and every the child and children of the ſaid *Mary Barrow* by *John Barrow*, her then late huſband, or by *John James*, her ſaid intended huſband, to be begotten, in ſuch ſhares and proportions, and to be paid at ſuch ages and times, and in ſuch manner, as ſhe, the ſaid *Mary Barrow*, ſhould by her laſt will and teſtament in writing, or by any writing purporting to be or in the nature of her laſt will and teſtament (notwithſtanding the ſaid then intended coverture) to be by her ſigned, ſealed, and executed, in the preſence of two or more credible witneſſes, give, order, direct, limit, or appoint; and that for ſuch eſtate or eſtates, rights, and intereſts, as ſhe, the ſaid *Mary Barrow*, ſhould think proper concerning the ſame reſpectively; and in caſe the ſaid *Mary Barrow* ſhould die without making any ſuch gift, order, direction, limitation, or appointment, in manner aforeſaid, or in caſe the whole of the ſaid meſſuages or tenements and premiſes, or the money intended to be ſecured on the ſaid bond, ſhould not be fully and abſolutely diſpoſed of, then in truſt to aſſign the ſaid meſſuage or tenement, and to divide the monies to be received from the ſaid bond, or ſo much thereof reſpectively as ſhould not be ſo diſpoſed of by the ſaid *Mary Barrow*, as aforeſaid, unto and amongſt all and every the child and children of the ſaid *Mary Barrow* by the ſaid *John Barrow* deceaſed, and to and amongſt all and every the child and children of the ſaid *Mary Barrow* to be begotten by the ſaid *John James*, her intended huſband, in equal ſhares, to be divided between them ſhare and ſhare alike, and to be aſſigned to ſuch of the ſaid children, as were or ſhould be a ſon or ſons at twenty-one, and to ſuch as ſhould be a daughter or daughters at twenty-one or marriage, which ſhould firſt happen; and in caſe any of them being ſons ſhould be then infants, or being daughters ſhould be under age and unmarried, at the death of the ſaid *Mary Barrow*, then in truſt to aſſign their reſpective ſhares thereof, when they reſpectively attain the age of twenty-one years or day of marriage; and in caſe there ſhould be only one ſuch child, then in truſt to aſſign the ſaid meſſuage or tenement and the money to ariſe by the bond, unto ſuch only child at the day and time and in manner aforeſaid; and in caſe the ſaid *Mary Barrow* ſhould die without any ſuch child or children, as aforeſaid, living at the time of her death, then in truſt for the executors or adminiſtrators of her, the ſaid *Mary Barrow*.

The marriage took place.

Mary James by her will, dated the 11th of *February* 1796, executed in the preſence of three witneſſes, reciting the ſettlement, ſo far as related to the ſaid leaſehold meſſuage and bond, and her power of appointment, and that part of the ſaid 2000*l.* ſecured by the bond had been received by her, and laid out in 1000*l.* 3 *per cent.* Conſolidated Bank Annuities, which were transferred to the truſtees upon the truſts declared by the ſettlement concerning the

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the bond, did thereby order, direct, limit, declare, and appoint, that the truſtees or the ſurvivor, his executors, *&c*, ſhould immediately after her deceaſe ſtand poſſeſſed of the ſaid meſſuage and premiſes in *Tottenham Court Road* and of the ſaid 1000*l.* Bank Annuities and the rents, intereſt, and dividends, thereof reſpectively, and of all money then due or owing upon, or which might thereafter be received by virtue of the ſaid bond, in truſt as to one moiety thereof for her daughter *Frances James*, wife of *Robert Jeremiah Edward James*, her executors, adminiſtrators, and aſſigns: but ſhe ordered and directed, that the rents and profits of her ſaid moiety of the ſaid meſſuage and premiſes in *Tottenham Court Road* aforeſaid ſhould be received by the truſtees or the ſurvivor, *&c*, during the natural life of her ſaid daughter, and paid to her for her own ſeparate uſe; and as concerning the other moiety of the ſaid truſt eſtate and premiſes and the rents, intereſt, and dividends thereof, in truſt to permit and ſuffer the ſame to be received by her ſon *Charles Barrow* for his life; but ſo as that the ſame may not be ſubject to any debts or incumbrances he then had, or might hereafter contract; and after his deceaſe upon truſt for ſuch wife and children or child of the ſaid *Charles Barrow* as he might leave behind him, in ſuch ſhares as he ſhould by any deed or writing, with or without power of revocation, to be by him ſigned, ſealed, and delivered, in the preſence of two or more credible witneſſes, or by his will in writing, to be by him ſigned and executed in the preſence of two or more credible witneſſes, give, order, direct, limit, or appoint, the ſame; and for want of ſuch gift, *&c*, and as to ſuch part of the ſaid premiſes, whereof no ſuch gift, order, *&c*, ſhould be made, in truſt to aſſign, transfer and pay, the ſame unto ſuch wife and children or child, equally, if more than one; and if but one of them ſhould be then living, then to aſſign the whole to ſuch only one, her or his executors, *&c*, for all the reſidue of the term, eſtate, and intereſt, which ſhould be then to come therein: but in caſe the ſaid *Charles Barrow* ſhould die without leaving a wife or child him ſurviving, then, after his deceaſe, in truſt to aſſign the ſame unto her ſaid daughter *Frances James*, her executors and adminiſtrators.

The teſtatrix died upon the 18th of *June* 1798. At her ſecond marriage ſhe had ſix children living by her firſt huſband: but

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only two of them, *viz. Charles Barrow* and *Frances James* were living, when ſhe made her will; and ſhe had no children by her ſecond marriage.

The bill was filed by the truſtees to have the rights of the defendants *Charles Barrow* and *James* and his wife under the power of appointment and the will aſcertained.

The defendant *Barrow* by his anſwer admitted, that the power was exceeded by limiting to him for life, and afterwards to his wife and children, *&c*, and, for want of ſuch wife or children, to the defendant *Frances James*, and that ſuch limitations are void; and he ſtated, that he is entitled to a moiety of the truſt eſtate; and that if the defendants *James* and his wife are entitled to any ſhare in the ſaid moiety, yet they are willing to relinquiſh their right in his favor.

The defendants *James* and his wife by their anſwer inſiſted, that the limitation of one moiety after the death of *Charles Barrow* to his wife and children or child is a void appointment; and that upon his death the defendant *Frances James*, her executors and adminiſtrators, will be entitled to the ſaid moiety; and that ſuch moiety ſo limited to *Barrow* for his life with ſuch remainders over is to be conſidered as unappointed: but they conſented to relinquiſh their right in the ſaid moiety in favor of the defendant *Barrow*.

This cauſe ſtood a ſhort time for judgment.

Maſter of the Rolls—The queſtion is, whether there is a good execution of the power by this will. It is clearly good as to the intereſt for life given to the ſon: but then as to the gift over after his deceaſe to his wife and children, who are not objects within the meaning of the power, they are ſtrangers as much as any others with reſpect to this marriage ſettlement. *The Duke of Devonſhire* v. *Lord George Cavendiſh* (*a*) is the only authority in favor of extending the power to grandchildren: though it is not a deciſion upon the point; and it was alſo conſidered as a caſe of election. But, except that caſe, all the caſes, *Pitt* v. *Jackſon* (*b*),

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(*a*) In the *King's Bench*, *Hil.* 22 *Geo.* 3. ſtated 2 *Term Rep. B. R.* 245. in *Robinſon* v. *Hardcaſtle*.

(*b*) 2 *Bro. C. C.* 51.

Routledge v. *Dorril* (*a*), where I decided the point upon very full conſideration, and *Robinſon* v. *Hardcaſtle* (*b*) determine, that where a power is given to diſtribute among particular objects, the power muſt be exhauſted among thoſe objects; and no other perſon, however nearly related to thoſe objects, can be joined with them as ſuch; and the children of the objects are no more objects than any other perſons. Therefore, as to ſo much of this property as is not diſtributed among the objects of the power, it is to be conſidered as unappointed.

Declare, that, as to one moiety of the truſt premiſes, the ſame is well appointed to *Frances James*, her executors, adminiſtrators, and aſſigns; and as to a moiety of the ſaid meſſuage in *Tottenham Court Road*, to her ſole and ſeparate uſe; and as to the other moiety of the ſaid truſt premiſes, declare, that the ſame is well appointed for the benefit of the defendant *Charles Barrow* for his life according to the truſts of the ſaid will and appointment; and that the appointment of the ſaid moiety of the ſaid truſt premiſes after his death in truſt for his wife and children is invalid; the ſame not being well appointed by the terms of the power in the ſaid marriage ſettlement; and declare, that in caſe *Charles Barrow* ſhall die without leaving a wife or child ſurviving, the ſame according to the ſaid appointment will belong to the defendant *Frances James*, her executors and adminiſtrators.

It was then ſuggeſted, that the ultimate limitation to *Frances James* depended upon the preceding eſtates given to the wife and children of *Charles Barrow*, and muſt fall with them; as the will muſt receive its general conſtruction from the death of the teſtatrix.

Maſter of the Rolls—I do conſtrue the will at the death of teſtatrix; and I think, the ultimate appointment is good. If there is no wife or child of *Charles Barrow*, the manner, in which ſhe has affected to execute the power, never takes effect at all. I have determined in *Routledge* v. *Dorril* according to *Robinſon* v.

(*a*) *Ante*, vol. 2. 357.

(*b*) 2 *Term Rep. B. R.* 241. ſee alſo *Briſtow* v. *Warde*, *Whiſtler* v. *Webſter*, and *Smith* v. *Lord Camelford*, *ante*, vol. 2. 336. 367. 698.

Hardcaſtle, that if you give for life to a child, who is an object of the power, and then to the children of that child, and, in failure of iſſue, to a perſon, who is an object of the power, that is void: but the diſtinction of this caſe from that is, that this limitation over to *Frances James* is, if *Charles Barrow* ſhould die without leaving a wife or child ſurviving. It fails, as far as it affects to give intereſts to the children: but is there any occaſion to make it fail upon the other point, the gift over to a perſon, who is an object of the power? Why am I to exclude the perſon taking over, who has a right to take? There are two alternatives: if *Charles Barrow* leaves no wife or children at his death, then the limitation over being to a good object ſhall take effect: if he does leave a wife or children, then it cannot take effect (*a*).

(*a*) It was ſaid at the Bar, that the defendant *Frances James* would appear in court to conſent to relinquiſh her right according to the offer in her anſwer: but ſhe did not appear.

HARRINGTON *v.* WHEELER.

June 21, 22. 24.

With reſpect to the performance of a contract the time is material. Therefore a bill for ſpecific performance was upon the groſs lacheſs of the plaintiff diſmiſſed with coſts.

RICHARD WHEELER, *John Wheeler*, and *James Gooſtree*, and *Leonora*, his wife, in her right, were under the will of *John Wheeler* the elder ſeiſed in fee-ſimple of an eſtate in the pariſh of *Offenham*, in the county of *Worceſter*, ſubject to a mortgage in fee for 1500*l.* and to an eſtate for life of *Leonora Wheeler*, the widow of the teſtator.

In 1789 *James Gooſtree* propoſed to purchaſe the two thirds of *Richard* and *John Wheeler*: but that treaty went off on account of a difference as to the terms. Soon afterwards a treaty took place between *John Harrington* and *Richard Wheeler* and *John Wheeler* for the ſale of the eſtate to *Harrington*; and by articles of agreement between them, dated the 22d of *April* 1790, in conſideration of 100*l.* paid by *Harrington* immediately, and if the farther ſum of 2500*l.*, to be paid, *Richard Wheeler* and *John Wheeler* agreed on behalf of themſelves and their mother and of *James Gooſtree* and his wife at the coſt of *Richard Wheeler* and *John Wheeler* and *Harrington*, equally, on or before the 24th day of *June* next to convey to *Harrington* and his heirs; and *Harrington* agreed to pay the ſum of 2500 *l.* at the time of executing the conveyance.

Under this agreement the ſum of 100 *l.* was paid by *Harrington*; and that ſum and the ſum of 4 *l.* 10 *s.* alſo advanced by him to the *Wheelers* was ſecured by them by a mortgage of two third parts of the premiſes, dated the 7th of *July* 1790, to *Harrington*, his executors and adminiſtrators, for the term of five hundred years. *Gooſtree* upon being informed of this contract conſented by a letter to the *Wheelers*, dated the 14th of *September* 1790, to execute the conveyance, provided, the mortgage of 1500 *l.* ſhould be diſcharged out of the purchaſe-money, and that his ſhare of the purchaſe-money ſhould be paid into his banker's.

Leonora Wheeler, the tenant for life, died in *May* 1795.

The bill was filed upon the 3d of *March* 1796 by *Harrington* for a ſpecific performance of the contract.

The defendants *Gooſtree* and his wife by their anſwer ſtated, that the plaintiff never to their knowledge or belief prepared any conveyance; nor required theſe defendants to fulfil the contract. The plaintiff for nearly three years after the execution of the agreement having neglected, and declined, and refuſed, to diſcharge the mortgage for 1500 *l.* and the mortgagee threatening an ejectment and to forecloſe, the defendant *James Gooſtree* at the requeſt of his wife and *Richard Wheeler* and *John Wheeler* paid off the mortgage, and took an aſſignment upon the 3d of *April* 1792. To the beſt of the knowledge and belief of theſe defendants no application was made to any of the defendants from the time the mortgage was ſo paid off until *December* 1795; when the defendants conceiving, that, as the plaintiff had ſuffered about ſix years to elapſe, ſince the agreement was entered into, without having carried it into effect, and as he had for the ſaid ſpace of ſix years then laſt taken no ſtep whatever to carry it into execution, or demanded a conveyance, he had therefore wholly abandoned and relinquiſhed the agreement, and the defendants *Richard Wheeler* and *John Wheeler* having in *December* 1795 again entered into a treaty for the ſale to the defendant *Gooſtree* of the two-thirds of the *Wheelers*, the plaintiff wrote a note to *John Wheeler*, ſaying, that as he underſtood, the eſtate was going to be ſold for much leſs than its value, he (the plaintiff) wiſhed to ſee him about it. The defendants notwithſtanding proceeded with their contract; and the conveyance was accordingly prepared, dated the 25th of *January* 1796; to which the plaintiff was made a party in reſpect of his mortgage for 104*l.*, that he might convey to the defendant *Gooſtree*; the conſideration-money for the purchaſe of the intereſt of the *Wheelers* being exhauſted by prior incumbrances. There were ſeveral other parties to the conveyance, incumbrancers under the *Wheelers*.

The anſwer denied, that the defendants *Gooſtree* and his wiſe had any notice of the loan and mortgage of 104*l.*, until *December* 1795.

By a farther anſwer *Gooſtree* and his wiſe ſtated, that they had not to the beſt of their recollection and belief any interview or converſation with, nor did they write any letters to, the plaintiff or the other defendants upon the ſubject of the plaintiff's agreement from the time the defendant *James Gooſtree* was informed of it, until he had agreed with the others for the purchaſe; except the letter mentioned in the former anſwer. After the latter contract the defendant *James Gooſtree* ſaw the plaintiff; who being informed of his purchaſe inſiſted on having his mortgage-money with intereſt; and he did not then or upon any occaſion inſiſt upon his agreement to the recollection and belief of theſe defendants.

Sarah Harrington, the plaintiff's daughter, being examined on his behalf, in order to account for the delay, depoſed, that in 1790, 1791, 1792, 1793, 1794, and 1795, ſhe made frequent inquiries after *Richard Wheeler* and *John Wheeler*, and could get no information of them. She went with her father to *Offenham* to inquire into the title, and view the eſtate, in *March* 1790. In 1791 ſhe found, the *Wheelers* had abſconded. The plaintiff was adviſed to get in the mortgage, but could not. In *November* 1795 ſhe inquired for *Gooſtree*. She met him accidentally about the 28th or 30th of *December*; and informed him of the plaintiff's intention of having the agreement ſpecifically performed. When ſhe heard, that the *Wheelers* were in priſon, ſhe conſulted an attorney; who told her, he could take no ſteps; as they were *dead in law*. Some time in 1791 ſhe called on *Gooſtree*; preſſing to have the buſineſs concluded, and informing him of what had been done towards inveſtigating the title; and he gave an evaſive anſwer.

The plaintiff's attorney depoſed; that he took ſteps for inveſtigating the title in 1790 and 1791. Upon the 28th of *February* 1791 he got Mr. *Atherton*'s opinion in favour of the title. In *March*, *April*, and *May*, he took ſteps at the deſire of the plaintiff and the *Wheelers* for completing the deed. He could not get the adminiſtration to the mortgagee until *November* 1791; which rendered the title incomplete till then.

The defendant's ſolicitor proved the application of the plaintiff and his daughter for the mortgage-money of 104*l.* upon hearing of the purchaſe of the defendant *Gooſtree*. The daughter ſaid, her father was willing to execute the deed, and to aſſign his mortgage upon receiving his principal and intereſt. The deponent would not adviſe *Gooſtree* to pay it: the intereſt of the *Wheelers* being extinguiſhed by prior incumbrances. In *December* 1795 *John Wheeler* called upon him with a note from the plaintiff.

Sarah Harrington upon her croſs-examination ſtated, that ſhe did not know or believe, there was any application to her father after the contract to pay off the mortgage of 1500*l.* She did not to her recollection and belief apply to *Gooſtree* or his ſolicitor for the 104*l.* and intereſt. When ſhe ſaw them at the chambers of the ſolicitor, *Gooſtree* told her, he had purchaſed it for 2500*l.*

This cauſe was very fully argued by *The Attorney General*, Mr. *Lloyd*, and Mr. *Alexander*, for the plaintiff, and *The Solicitor General*, and Mr. *Roupel*, for the defendant *Gooſtree*; who relied upon the length of time and the conduct of the plaintiff.

LORD CHANCELLOR—There is no one caſe to ſupport this bill, except *Gibſon* v. *Patterſon* (*a*); which is a totally falſe Report. Lord *Hardwicke* is there made to ſay, the time is not at all material. I (*b*) had occaſion to look into Lord *Hardwicke*'s note

book

(*a*) 1 *Atk.* 12. ſee Mr. *Sanders*'s note.

(*b*) *Lloyd* v. *Collett*, 4 *Bro. C. C.* 469. In that caſe the Lord Chancellor pronounced the following judgment.

There

book upon it; and by the evidence it appeared, that after ſeveral acts done the vendee threatened to go into *Scotland* to avoid being compelled to complete the purchaſe. Lord *Hardwicke* determined it entirely upon the evidence; of which no notice is taken in the Report.

The conduct of the parties, inevitable accident, *&c*, might induce the Court to relieve againſt a lapſe of the day fixed for completing a purchaſe.

There is nothing of more importance, than that the ordinary contracts between man and man which are ſo neceſſary in their intercourſe with each other, ſhould be certain and fixed; and that it ſhould be certainly known, when a man is bound, and when not. There is a difficulty to comprehend, how the eſſentials of a contract ſhould be different in equity and at law. It is one thing to ſay, the time is not ſo eſſential, that in no caſe, in which the day has by any means been ſuffered to elapſe, the Court would relieve againſt it, and decree performance. The conduct of the parties, inevitable accident, *&c*, might induce the Court to relieve. But it is a different thing to ſay, the appointment of a day is to have no effect at all; and that it is not in the power of the parties to contract, that if the agreement is not executed at a particular time, the parties ſhall be at liberty to reſcind it. In moſt of the caſes there have been ſteps taken. Is there any caſe, in which without any previous communication at all between the parties the time has been ſuffered to elapſe? I want a caſe to prove, that, where nothing has been done by the parties, this Court will hold in a contract of buying and ſelling a rule, that certainly is not the rule at law, that the time is not an eſſential part of the contract. Here no ſtep has been taken from the day of the ſale for ſix months after the expiration of the time, at which the contract was to be completed. If a given default will not do, what length of time will do? It is true, the plaintiff muſt have conſidered himſelf bound after the day: ſo he was: he could not take advantage of his own neglect. He ſays, "by my own "default this contract is void in law: I cannot ſucceed at law: on the contrary the other "party is entitled to recover back the money, he has paid in expectation of the execution "of his contract; thereſore an equity ariſes to me." An equity out of his own neglect! It is a ſingular head of equity. The conſequences of this idea, which I know has prevailed, have been extremely inconvenient. The hardſhip generally falls upon the other party. The utmoſt extent of relief, where the party is diſcharged at law, would be on making him full compenſation. Is intereſt of the purchaſe money compenſation? The time may go on for years. Suppoſe the ſubject was an eſtate ſold for payment of debts: debts and legacies carry intereſt at 5 *per cent.*: the purchaſe money may carry 4 *per cent.* from the time the contract ought to have been completed. Where it is with a view to a reſale, as in this caſe, what is the conſequence? Here a man has purchaſed theſe ground rents upon a ſpeculation, which is totally defeated. I ſee no reaſon to injoin the action. You deliver yourſelf from that by paying the money. The action is againſt the auctioneer. I do not think the equity extends to him; for he perſonally contracts, that he receiving the depoſit money will return it, if the terms are not complied with.

Dec. 3d.

LORD CHANCELLOR—I have looked into the caſe of *Gibſon* v. *Patterſon*, in which the Reporter has made Lord *Hardwicke* treat the time as totally immaterial. It is to be obſerved, that the circumſtances of that caſe, of which I have taken a copy, did not call for any ſuch opinion. The purchaſer, who hung back, had bought an eſtate in mortgage. The contract took place in *November*, and was to be completed in *February*; in that time therefore the mortgage could only be paid off by treaty with the mortgagee. Upon the facts it appeared, that application had been made to the mortgagee; who conſented to take his money. Draughts of the conveyance were made, and countermanded by the purchaſer. He had after the contract demiſed part of the eſtate to the vendor at a rent; and upon application being made to him, every thing being ready, he ſaid, he would be off the bargain; that he had no money to pay for it; and if they attempted to force him, he would go to *Scotland* to avoid it.

There could not be the ſmalleſt argument upon it, nor the leaſt doubt about the decree.

In this caſe the plaintiff had done no one act. The pretence, that the *Wheelers*, who were in priſon, could not be found, is ridiculous. I do not ſee, what this defendant could do but endeavour to purchaſe it.

The bill muſt be diſmiſſed with coſts.

The Solicitor General obſerved, that the rule is ſtated in conformity to this deciſion in *The Grounds and Rudiments of Law and Equity*; and *Hayes* v. *Caryll* (*a*) is referred to. He alſo mentioned *Wingfield* v. *Whaley* (*b*).

(*a*) 5 *Vin.* 538; 1 *Bro. P. C.* 27.
(*b*) 2 *Bro. P. C.* 447. ſee alſo *Forreſt* v. *Elwes*, *ante* 492. *Spurrier* v. *Hancock*, *ante* 667.

Ex parte HAWKINS.

June 25.

A detainer, before the defendant could be diſcharged from an illegal arreſt, as where he was returning from his examination under a Commiſſion of bankruptcy againſt him, cannot be ſupported.

THE petitioner, who became a bankrupt upon the 27th of *September* 1796, having unfortunately omitted to ſurrender at the time, by an order made on a petition preſented for that purpoſe the Commiſſioners were ordered to call a meeting; the petitioner to be at liberty to ſurrender, and be examined, &c, in the ſame manner as if he had ſurrendered within the time limited.

The bankrupt ſurrendered at a meeting called under that order upon the 1ſt of *June*; which was farther adjourned to the *Monday* following; when he paſſed his final examination; and upon quitting the Commiſſioners on his return home he was arreſted by proceſs out of the Court of *Tolzey* in *Briſtol* at the ſuit of *Chriſtopher Bedford* for 500*l.* and upwards. *Bedford* diſcontinued the action on the following day: but, before the petitioner could be diſcharged, a detainer was lodged againſt him by *Francis Smith*, *William Parſons*, and *Henry Smith*, for 300*l.* upon proceſs out of the Court of the *Tolzey*. *Bedford* afterwards iſſued a new writ and lodged a detainer againſt the petitioner for the ſame debt; and he remained in cuſtody in *Newgate*, *Briſtol*.

The petitioner prayed, that *Smith*, *Parſons*, and *Smith*, and *Bedford* may be reſpectively ordered to diſcharge the petitioner from the ſaid arreſts and detainers.

The plaintiffs in the ſaid actions had reſpectively proved their debts under the Commiſſion; and a dividend of 6*s.* in the pound had been declared: but no dividend had been received.

Mr. Cooke for the petitioner contended, that he ought to be diſcharged.

Mr. Whiſhaw for the plaintiffs at law ſupported the detainers.

Lord Chancellor ſaid, the original arreſt being bad, the detainers could not be ſuſtained.

The order was therefore, that the petitioner ſhould be diſcharged.

Rolls.
June 25.

REEVES *v.* BRYMER.

BRYMER *v.* REEVES.

Michael Foster by his will, dated the 13th of *November* 1786, made the following diſpoſition:

" I give to my wife *Taumaſon Foſter* the intereſt and dividends " of 5000*l.* 4 *per cent.* Bank Annuities for the term of her natural " life; which 5000*l.* I direct ſhall be continued in the ſame ſtock " and then to be ſhared equally ſhare and ſhare alike to my " children that ſhall be then living. Alſo I give to my aforeſaid " wife my leaſehold houſe and premiſes now in my poſſeſſion in " the pariſh of *Wanſtead* in the county of *Eſſex* for the term of " her natural life, and then to be lett to the beſt advantage during

Legacy to the teſtator's wife of the dividends of ſtock for her life; which, he directs, ſhall be continued in the ſame ſtock, and then to be ſhared equally, ſhare and ſhare alike, to his children, that ſhall be then living: he alſo gave to his wife a leaſehold houſe (of which 50 years were unexpired) for her life, and then to be let during the time of the leaſe to come, and the neat produce thereof to be equally placed in the ſtocks for the benefit of his children that ſhall be then living equally; and as to the reſidue of his eſtate whatſoever and whereſoever the product he gave, *&c*, the ſame to be collected yearly to his wife and children equally ſhare and ſhare alike, that are then living. In other diſpoſitions the words "*then*" and "*then living*" were uſed with reference to ſome period expreſſed, *viz.* the age of twenty-one, or the death of the perſon to take for life. The ſtock and houſe veſted at the wife's death in thoſe children, who ſurvived her: the reſidue veſted at the teſtator's death in his wife and all the children equally.

Grandchildren may take under the deſcription of children, if there can be no other conſtruction: not otherwiſe.

Bequeſt of the dividends of ſtock to *A.* for her life; and then to remain in the ſame ſtock till each of her children attain twenty-one, and then to be paid their equal ſhare of the ſame; if any die before twenty-one, to go to the ſurvivors or ſurvivor; and not to be under any claim or juriſdiction of their father or any huſband *A.* may have. Of two children one died in the life of her mother, married, and above twenty-one. Transfer of a moiety to her adminiſtrator upon the mother's death eſtabliſhed: the other moiety veſted in the ſurviving daughter, an infant, ſo far as to entitle her to the dividends; and a reference was directed as to her father's ability.

"the time of the leaſe to come; and the neat produce thereof to "be equally placed in the ſtocks for the benefit of my children, "that ſhall be then living equally ſhare and ſhare alike."

The teſtator then gave to his wife all his goods, plate, linen, carriage, and carriage horſes, cows, pigs, poultry, and all things of that ſort, belonging to him at his deceaſe, upon the houſe and premiſes aforeſaid, for her ſeparate uſe. He then gave to his daughter *Sarah Lench* the intereſt and dividends of 3000*l.* 4 *per cent.* Bank Annuities for the term of her natural life and her own uſe, and not to be ſubject or under any control of her preſent huſband or any other ſhe may have, and then to remain in the ſame ſtock, till each of her children ſhall arrive at the age of twenty-one years: then he directed it to go to the ſurvivor or ſurvivors of the ſaid children, and not to be under any claim or juriſdiction of her father, or any huſband ſhe may have.

The teſtator then gave his ſon-in-law *John Lench* a freehold houſe with the appurtenances for his life, and after his ſaid ſon-in-law's deceaſe to go to his children as ſhall be then living ſhare and ſhare alike. He alſo gave to *John Lench* all his looms and working utenſils belonging to him at the time of his deceaſe, all the houſehold goods or china upon the premiſes at the time of his deceaſe; and as to his plate he gave it to his four daughters equally ſhare and ſhare alike or the ſurvivor of them at the time of his deceaſe. Alſo he gave to his daughter *Mary Brymer* the intereſt or dividends of 3500*l.* in the 3 *per cent.* Conſolidated Bank Annuities for the term of her natural life, and then to remain in the ſame ſtock till each of her children ſhall arrive to the age of twenty-one years, and then to be paid their equal ſhare of the ſame: but if any of the children ſhould die, before they arrive to the age of twenty-one years, then he directed it to go to the ſurvivor or ſurvivors of the ſaid children, and not to be under any claim or juriſdiction of their father or any huſband ſhe may have.

The teſtator then made a diſpoſition almoſt exactly the ſame as to 3500*l.* 3 *per cent.* Conſolidated Bank Annuities in favor of his daughter *Ann Hall* and her children; and as to 3500*l.* 3 *per cent.* Old *South-Sea* Annuities in favor of his daughter *Elizabeth Lench.* He then gave his grand-daughter *Sarah Rodwell* 500*l.* for her whole and ſole uſe, and not to be under any claim or juriſdiction of her preſent or any huſband, to be paid in twelve months after his (the teſtator's) deceaſe, to be taken out of 125 *l.* Short Annuities; alſo to his daughter *Sarah Lench* a freehold houſe, in truſt for her ſon *Benjamin Lench*, and to be given, when he arrives to the age of twenty-one years, and another freehold houſe, in truſt for her ſon *Henry Lench*, if he arrives to the age of twenty-one, with ſurvivorſhip, if either ſhould die before twenty-one; and if they ſhould die without iſſue, then he directed, it ſhould go to their mother and her three ſiſters equally ſhare and ſhare alike as ſhall be living at the time of their deceaſe. Then after giving legacies to his executors of 20 *l.* each and 10 *l.* each for mourning he diſpoſed of the reſidue thus:

"And after all my juſt debts and funeral expences are paid all "the reſt and reſidue of my eſtate and effects whatſoever and "wheresoever the product I give deviſe and bequeath the ſame to "be collected yearly to my wife *Taumaſon Foſter* and children "equally ſhare and ſhare alike that are then living."

The teſtator died upon the 18th of *November* 1789; leaving his widow *Thomaſin* and the four daughters named in the will, all married, and having children. *Mary Brymer* had two children; *Ann*, who attained the age of twenty-one, married *James Tapp*, and died in 1792 in the lifetime of her mother; and *Charlotte*; who was of the age of ſixteen. *Mary Brymer* died upon the 28th of *January* 1794. The executors transferred a moiety of the ſum of 3500 *l.* 3 *per cent.* Conſolidated Bank Annuities to *James Tapp*, as adminiſtrator of his wife; and they paid the debts, and divided among the reſiduary legatees all the reſidue, except ſuch part as conſiſted of leaſehold eſtate. Of the leaſe of the houſe at *Wanſtead* fifty years were unexpired.

Upon the death of *Mary Brymer* doubts ariſing, whether her huſband *William Brymer* was entitled as her adminiſtrator, to any ſhare of the reſiduary perſonal eſtate then undivided, *viz.* the leaſehold eſtate, the teſtator's widow and *William Brymer*, and the three remaining daughters with their huſbands, ſigned an agreement, authoriſing the executors to pay one fifth of the reſidue to *William Brymer;* under which agreement they made payments to him till 1797. In that year, *Thomaſin Foſter* having died upon the 29th of *April*, *William Brymer* filed the bill, upon which the ſecond of theſe ſuits was inſtituted, on behalf of himſelf and his infant daughter; praying, that he may be declared entitled to one fourth of the 5000*l.* 4 *per cent.* Bank Annuities, of the leaſehold premiſes at *Wanſtead*, and the reſidue; that the ſum of 1750*l.* 3 *per cent.* Conſolidated Bank Annuities may be transferred to the Accountant General for the benefit of the plaintiff *Charlotte Brymer*; that the truſts may be declared; and that it may be referred to the Maſter to inquire, whether the plaintiff *William Brymer* is of ability to maintain his daughter; and if the Maſter ſhall find, that he is not of ſufficient ability, that the dividends may be paid to him.

The plaintiff *Brymer* not proſecuting that cauſe, the bill in the other cauſe was filed by the executors in 1799, to have the rights of the parties aſcertained.

Mr. Piggott for the executors, plaintiffs in the firſt cauſe—The moſt natural conſtruction in this Court is, that the word "*then*" refers to the teſtator's death. That will create a tenancy in common, and give effect to the words "*ſhare and ſhare alike*"; and the conſequence is, that the diſpoſition is in fifths to the widow and four children. The words import an abſolute gift of the whole reſidue to the wife and children ſhare and ſhare alike.

The agreement, to which *Brymer*, whoſe wife, one of the daughters, was dead at the time, was a party, is according to that conſtruction; and now he alone diſputes it; admitting the agreement; and not pretending, that he was impoſed upon; but ſimply alleging, that he is entitled to a fourth inſtead of a fifth.

Mr. Graham and Mr. Hart for William Brymer, plaintiff in the ſecond cauſe—This plaintiff is entitled in right of his wife to an equal ſhare of the 5000*l.* ſtock, and of the leaſehold intereſt, as well as that equal ſhare, that according to the agreement he has in the reſidue. It will probably be contended for the ſurviving daughters, that the word "*then*" refers to the death of the teſtator's wife; and that, Mrs. *Brymer* having died in her life, the diviſion of the 5000*l.* ſtock and the leaſehold intereſt is to be among the three daughters, who, ſurvived the wife. If the death of the teſtator's wife had been particularly mentioned, and the word "*then*" had immediately followed, it would have been difficult to contend againſt that conſtruction; though it might have been contrary to the intention: but this is very different. The will ſeems penned with reference to the actual, exiſting, ſtock the teſtator then had. All his children, being four daughters, were married, and had children. The views of the teſtator therefore was to ſecure the houſe and income to his wife for her life. Then the general intention was to make all his children equal. There is no reaſon for excluding any one from the ſingle circumſtance of her not being alive at the death of the wife, however numerous a family the daughter might leave. If all of them had been then dead, the diſpoſition would upon that conſtruction be totally defeated. It is true, the reſidue is diſpoſed of: but that is ſtrong in favor of this plaintiff; for the words "*then living*" thrown into that clauſe do not refer to the death of the wife: they cannot poſſibly there have any reference except to the time of the teſtator's death. The other property is taken out of the reſidue ſimply for the purpoſe of creating a life intereſt and temporary proviſion for his wife. There is not a neceſſary reference to the death of the wife. The teſtator has not ſaid "after her deceaſe." *Non conſtat*, to what time the legacy is to be continued in the ſame ſtock. In the diſpoſition of the leaſehold houſe the word "*then*" is uſed in the ſame way; and unleſs it refers to the teſtator's death, a conſtruction, which it will bear, it muſt mean children living at the expiration of the leaſe: that is, at the end of fifty years; which could not be the intention. In the other parts of the will the teſtator has anxiouſly provided, that the legacies ſhould veſt at the age of twenty-one.

The agreement means only, that while *Brymer* conſents to receive a fifth, the executors ſhall be ſanctioned in paying it. He has received it, ſubject to that reſtriction; reſerving to himſelf liberty to apply to the Court and claim a fourth.

Mr. Grant and Mr. Steele for the three ſurviving daughters—It is plain upon the bequeſt itſelf, that this property belongs excluſively to the daughters, who ſurvived their mother. The other conſtruction rejects one half of the words, which the teſtator has ſo anxiouſly uſed. It is evident, the words in the latter part of the clauſe as to the 5000*l.* ſtock have a clear reference to thoſe in the preceding part. The direction, that the money ſhall be continued in the ſame ſtock, is thrown in by way of *parentheſis*. It is a very forced conſtruction, that the word "*then*" has reference, not to the period the teſtator has mentioned, but to another period, which he has not mentioned. It is true, he has not expreſsly mentioned the death of his wife: but he has mentioned the duration of her life; which is the ſame thing. They admit, that is the time, at which the diviſion is to take place. In the common limitation to one for life, and then to the children, that ſhall be then living, it is clear, all the children are not intended. It is not alleged, that in the proviſion for the grand-children the word "*then*" has no meaning: it ſeems admitted, that there it muſt refer to what is mentioned immediately before, *viz.* the age of twenty-one. The conſtruction contended is directly oppoſite to that, which the word muſt have in the ſame ſentence. The clauſe reſpecting the leaſe muſt receive juſt the ſame conſtruction; which ſeems agreed. There is nothing to warrant the conſtruction, that it is to refer to the termination of the leaſe.

Mr. Richards for the executors of the teſtator's widow, claiming one fifth of the reſidue, was ſtopped by the Court.

Mr. Wetherall for the grand-children—There is one poſſible conſtruction for the grand-children; that an accumulation is to take place, till the leaſe runs out; and then all the children may be dead; and the grand-children would become entitled; and they may take under the deſcription of children. The houſe is directed to be let "during the time of the leaſe to come."

Mr. Graham in reply—The Court muſt ſearch for an implied time. Then the word "*continued*" neceſſarily has reference to the teſtator's death. That cannot be referred to the death of his wife; for at that time the diviſion is to take place. The intended continuation therefore is to be from the teſtator's death. The word "*then*" muſt refer to the ſame time; from which the continuation is directed to take place for the purpoſe of giving theſe ſecurities for the life eſtate of the wife.

Maſter of the Rolls—The claim of the executors of the teſtator's widow to a ſhare of the reſidue is too clear. They muſt be entitled to it.

With reſpect to the point ſuggeſted for the grand-children, I can hardly ſuppoſe it intended to be left in the ſtocks till the end of a leaſe for fifty years. Children may mean grand-children, where there can be no other conſtruction; but not otherwiſe (*a*).

Every word of a will muſt have a meaning imputed to it, if capable of it without a violation of the general intent or any other proviſion in the will.

As to the principal point, it is a certain rule of conſtruction, that every word of a will muſt have a meaning imputed to it, if it is capable of a meaning without a violation of the general intent, or of any other proviſion in the will, with which it may appear inconſiſtent. The queſtion is, what is the period; which the teſtator has not certainly fixed. The word "*then*" certainly is a word marking the time, at which the diſtribution is to take place. Upon the firſt bequeſt there can be no doubt. It is ſaid, it muſt mean children living at the teſtator's death; and to ſhew the abſurdity of the other conſtruction this argument is uſed; that none of the children might have been living at the death of the wife; and there might be an inteſtacy. The very ſame abſurdity might ariſe, if the words are conſidered as referring to children living at the teſtator's death; for they might all be dead at that time; and the grand-children would be equally defeated. If ſo, the word "*then*" being a word of reference, I muſt ſee, if I can refer it to any antecedent according to grammatical conſtruction. I ſee nothing, to which I can refer it, but the death of the wife. How long is the ſtock to be continued? So long as the wife ſhall live. If referred to the continuance in the ſtock, it muſt mean after the death of the wife, *viz.* children then living, when it is to be ſhared. When is that? When the continuance of the ſtock for the benefit of the wife, that is, for the life of the wife, is to ceaſe. I am therefore of opinion, that I am bound upon all the rules of conſtruction, that ever have prevailed, to give theſe words that conſtruction, which the grammatical ſenſe of the words import; and which does not involve any greater abſurdity than the ſuppoſition of any other time.

The ſame conſtruction muſt be made as to the leaſehold houſe at *Wanſtead*. The word "*then*" can there have no grammatical reference but to the laſt antecedent, the expiration of the term. If the leaſe had been a ſhort term, it might poſſibly have been contended, that the meaning was, that the produce ſhould be placed in the ſtocks, as long as the leaſe ſhould endure, and then

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(*a*) See *Wythe* v. *Thurlſton*, 1 *Veſ.* 196; *Amb.* 555. *Davenport* v. *Hanbury*, *ante*, vol. 3. 257; where the former caſe is ſtated from the Regiſter's Book. *Horſepool* v. *Watſon*, *Freeman* v. *Parſley*, *ante*, vol. 3. 383. 421. *Royle* v. *Hamilton*, *ante*, 437.

to be divided among thoſe, who ſhould be living at the expiration of the leaſe. I do not know, that that would do good to any of the parties: but upon a leaſe for fifty years that conſtruction is impoſſible. I am therefore under the neceſſity of referring it to the death of the wife, during whoſe life the rents and profits were applicable.

I rather doubt, whether the teſtator did not mean the ſame as to the reſiduary clauſe: but I am glad, it is not ſo expreſſed, and that as to that *Brymer* is not excluded. I ſhould have great reluctance to exclude any children from a ſhare; which might ariſe perhaps from looſe words thrown in: but however looſe, if any ſenſe can be collected, the Court is bound to give it.

As to the legacy of 3500*l.* three *per cent.* Conſolidated Bank Annuities to *Mary Brymer* and her children, the transfer of a moiety to *James Tapp*, as adminiſtrator of his wife, who had attained the age of twenty-one, was right; and the other moiety is a veſted intereſt, ſo far as to give the plaintiff *Charlotte Brymer* a right to receive the dividends (*a*).

By the decree it was declared, that the 5000*l.* four *per cent.* Bank Annuities upon the death of the teſtator's wife became diviſible among ſuch of his children as were living at her death; and that the leaſehold houſe and premiſes at *Wanſtead* became diviſible upon her death among ſuch of the teſtator's children as were then living; and that the reſidue upon the death of the teſtator became diviſible among his widow and all his children, ſhare and ſhare alike; and it was directed, that the remaining 1750*l.* 3 *per cent.* Conſolidated Bank Annuities ſhould be transferred to the Accountant-General, and carried over to the account of the plaintiff *Charlotte Brymer*; and that the maſter ſhould inquire, whether her father was of ſufficient ability to maintain her (*b*).

(*a*) See *Booth* v. *Booth*, *ante*, 399.

(*b*) Where there is an expreſs direction for maintenance, that reference is now diſpenſed with: *Mundy* v. *Earl Howe*, 4 *Bro. C. C.* 223. *Hoſte* v. *Pratt*, *ante*, vol. 3. 730.

1799.

June 26th.

UPTON *v.* LORD FERRERS.

(The Maſter of the Rolls for the Lord Chancellor.)

Bidding opened on advance of 50*l.* on 380*l.* and paying the expence. 10*l.* *per cent.* not ſufficient on a ſmall ſum.

UPON a motion to open biddings 40*l.* was offered as an advance upon a bidding of 380*l.*

Mr. Martin in ſupport of the motion ſtated 10*l.* *per cent.* to be a ſufficient advance; and ſaid, that opening this bidding would occaſion no additional expence, as the bidding upon another lot in the ſame cauſe was directed to be opened.

Mr. Fonblanque for the purchaſer denied, that there would be no additional expence; and as to the practice ſaid, formerly an advance of 10*l.* *per cent.* was not thought ſufficient.

The Maſter of the Rolls ſaid, 10*l.* *per cent.* upon a ſmall ſum was not ſufficient, and doubted, whether this would not occaſion additional expence.

The bidding was opened on advancing 50*l.* and paying the expence (*a*).

(*a*) *Ante*, vol. 1. 453. *Watſon* v. *Birch*, *ante*, vol. 2. 51. See alſo *ante*, vol. 2. 286. 487. *Chetham* v. *Grugeon*, *poſt*.

June 27th. July 1.

DENCH *v.* BAMPTON.

The lord of a manor is confined to his legal remedy for waſte committed by a copyholder; and has no equity for an injunction and account. Upon the evidence the bill was diſmiſſed with coſts.

THE manor of *Botley* in the county of *Southampton* was deviſed to *John Maurice Eyre* and *Henry Eyre* for their lives and the life of the ſurvivor; remainder to the firſt and other ſons of *John Maurice Eyre* in tail male; remainder to the firſt and other ſons of *Henry Eyre* in tail male; remainder to the daughters of *John Maurice Eyre* and *Henry Eyre* as tenants in common in tail.

The bill was filed by *John Maurice Eyre*, *Henry Eyre*, and his eldeſt ſon *Henry Eyre*, the firſt tenant in tail in remainder in exiſtence, and the truſtees, againſt a copyhold tenant; praying an account of the oak-trees aſſigned to the defendant in the year 1792 for botes and repairing fences, &c, and of the manner, in which the ſame or the timber coming therefrom from the root up to the firſt main bough proceeding from the heart had been uſed, or employed, or otherwiſe diſpoſed of by the defendant; and alſo, that an account may be taken of all oak-trees cut from the ſaid copyhold premiſes by the defendant without aſſignment in or about the year 1792 or ſince, and of the value of the timber thereof from the root up to the firſt main bough, &c; alſo, that an account may be taken of maiden oaks ſhrouded and lopped by the defendant, and of the damage thereby done to the timber thereof; and that the defendant may be decreed to make ſatisfaction for the value of the timber of the ſaid oak-trees ſo aſſigned to him from the root up to the firſt main bough *&c*, not employed by him for botes, or repairing fences, *&c*, but ſold by him, or otherwiſe employed by him to his own uſe, and for the value of the timber of the other oak-trees cut without aſſignment from the root up to the firſt main bough *&c*, and alſo for the damage done by ſhrouding or lopping the ſaid maiden oaks; the plaintiffs waiving all penalties; and that an injunction may iſſue.

The injunction was obtained. Upon the anſwer and the evidence for the defendant the cuſtom of the manor appeared to be, that the lord and tenant have a joint intereſt in all oak-trees: the body of the tree up to the firſt main bough proceeding from the heart belonging to the lord; and the tenant in fee being entitled to the lop, top, and bark, of ſuch oak-trees, and to oak-timber by aſſignment for reparations and botes; and it was uſual, where oak-trees have been cut down for ſale by agreement between the lord and the tenant, for ſuch lord and tenant to divide the money: but there was a great deal of contradictory evidence as to the right of the tenant to ſhroud and lop, and to the bark, without aſſignment, and alſo as to the cuſtom, when any oak-trees have been aſſigned for botes, and have been ſold, for the lord and tenant to divide the money. The defendant's eſtate conſiſted of three ſmall fields of arable land, of the yearly value of about eight guineas, with no houſe, but a very ſmall cottage.

The anſwer ſtated, that in 1792 upon the application of the defendant for oak-timber for botes and repairs fourteen oak-trees were aſſigned accordingly. In 1795 he claimed an allowance of oak-timber for botes generally. No aſſignment being made, and the defendant claiming oak-timber for fire-bote, which was refuſed, he admits employing workmen to ſhroud and lop certain oak-trees without the conſent of the lord; who in perſon forbad them: but the defendant ordered them to go on. He inſiſts upon his right to do ſo according to the cuſtom; and denies, that the trees were injured by it. He denies, that over and above the trees ſo aſſigned to him he has at any time ſince cut down and felled any other oak-trees growing upon the premiſes without any aſſignment or authority, or ever ſold any ſuch trees, or received the price thereof, or converted them to his own uſe. By a farther anſwer he ſtated, that he knows not the value of the trees, that were aſſigned to him; but admits, that ſome part thereof not being convertible to the uſe he wanted was ſold by him for 17*l.* 14*s.*; which he laid out in the purchaſe of a waggon, a plough, a cart, and timber for repairs; and he inſiſts, he did not miſapply it. He alſo inſiſts, that the trees he ſhrouded and lopped overſpread his ground, and did him damage; and that by the cuſtom he is entitled to the lop, top, and bark, of all oak-trees.

The defendant went into evidence in ſupport of his anſwer as to the application of the timber aſſigned in 1792, and as to the repairs done; and alſo as to the right to ſhroud and lop trees, that overſpread his ground, and occaſioned damage.

By the plaintiff's evidence it appeared, that the intereſt of the lord of the manor in the timber growing thereon was upon the purchaſe by the deviſor valued at 913*l.* 2*s.* 3*d.*, and paid for. The fourteen oak-trees aſſigned in 1792 contained about 236 feet of timber, or four loads and thirty-ſix feet, proper for the repairs required.

Gabriel Saunders depoſed, that he purchaſed in *June* 1792 from the defendant a quantity of oak-timber, containing fourteen loads and ſeven hundred feet: which, when hewn, produced 1102 feet, or twenty-two loads and two feet, hewn meaſure, that grew upon his copyhold eſtate; and that the deponent paid him for it 52*l.* 10*s.* This did not include the lop, top, and bark. The value, including that, was 76*l.* 3*s.* 7*d.*

Another witneſs, who was employed to draw the timber ſold to *Saunders*, confirmed his evidence; and ſtated the value of the timber ſold to be 84*l.* The deponent carried it to *Itchen* Ferry. The better part was ſold for the uſe of the navy at *Portſmouth* Dock; and part was ſold to ſhip-builders.

Upon the evidence of the application of the timber aſſigned in 1792 and the repairs done the plaintiffs waived the account as to that; unleſs it ſhould be contended, that the timber ſold to *Saunders* aroſe from the very trees aſſigned.

The Lord Chancellor, when the cauſe was opened, expreſſed great doubt as to his juriſdiction; and aſked, whether there was any precedent, in which the Court had interpoſed by injunction on behalf of the lord againſt a copyholder; and whether the lord of the manor in this caſe could bring trover for the timber felled.

The Attorney General for the Plaintiffs compared the caſe of the lord and tenant to that of a tenant for life and the remainder-man. In anſwer to the other queſtion he ſaid, that if by the cuſtom the property in the tree up to the firſt main bough belongs to the lord, he might bring trover.

Lord Chancellor—I very much doubt it. Perhaps it might be ſo, if the copyholder without any right at all cut timber. But according to the right, as it is ſtated by this anſwer and the evidence, when the tree is felled, the lord could not bring trover, for ſo much of the tree belongs to the tenant. When timber is aſſigned to be applied in repairs, I agree, in point of law it muſt be ſpecifically applied: yet it is very hard to ſay, and it could not be ſaid in this Court, that, if the tenant ſold the timber, and bought other timber, it ſhould not be applied in repairs.

With reſpect to the general point the right between the lord and the copyholder is a legal right; and I do not know, that the copyholder is to be reſtrained from cutting timber, if he will do it at the riſk of forfeiture. Let the lord proceed for the forfeiture. It is not like the caſe of a tenant for life and the remainder-man. They all claim under the ſame title, the ſame will or ſettlement. The right of the lord is a legal right. The cuſtoms of different manors vary exceedingly. Sometimes they give the timber to the lord; ſometimes to the tenant. The Court of King's Bench once ſaid, no cuſtom could give it to the tenant. A great deal of doubt

Quære, whether by the cuſtom of a manor the timber can belong to the tenant.

doubt has always been entertained upon that point. Cuſtom makes every thing in a copyhold. This has been decided, that this Court will not relieve the tenant againſt a forfeiture. The caſe of *Peachy* v. *The Duke of Somerſet* (*a*) has eſtabliſhed that. If the tenant commits a forfeiture, and the lord enters, there is no circumſtance of equity; no recompenſe ſhall be made (*b*); which ſhews how little a court of Equity thinks itſelf entitled to interfere. The lord and the tenant are connected together: but their rights are oppoſite and hoſtile rights.

The miſchief, that would ariſe, if queſtions as to the enjoyment of copyhold eſtates were made the ſubject of bills in equity, is certainly an ingredient that, enters into my conſideration. If it is, as I believe, a new application to a court of equity, I think it of importance, that the general point ſhould be conſidered. Let the cauſe ſtand over for that purpoſe.

July 1. *The Attorney General and Mr. Wooddeſon for the Plaintiffs*—There is no caſe *in ſpecie* the ſame as this; *viz.* upon the bill of the lord of a manor againſt his copyhold tenant, claiming a qualified intereſt in the trees, to reſtrain what would in a legal view be waſte, and for an account. The principle, upon which this bill is filed, is not for the purpoſe of the account, but for ſtaying waſte, upon the ground of irreparable damage, if an injunction is not obtained. In the caſe of a tenant of a freehold eſtate a bill for an account and ſatisfaction for waſte after the term is expired is not entertained. The diſtinctions upon that ſubject are laid down in *Jeſus College* v. *Bloom* (*c*); in which caſe Lord *Hardwicke* directed precedents to be ſearched. That caſe goes this length; that, whatever the nature of the eſtate may be, the juriſdiction is not founded upon the demand of the account: but if there is a ground for an injunction, the Court will make a complete decree; and if the relation, which may occaſion waſte as between them, does not ſubſiſt, and therefore there is no caſe for an injunction, the Court will not entertain the bill for the account. *Whitfield* v. *Bewit* (*d*), there cited, may poſſibly apply to ſuch a

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(*a*) *Pre. Ch.* 568.
(*b*) See the diſtinction taken in *Peachy* v. *The Duke of Somerſet.*
(*c*) 3 *Atk.* 261.
(*d*) 1 *P. Will.* 240. 3 *P. Will.* 259.

caſe as this; in which the lord and the tenant have a common intereſt in the tree cut down. In *The Biſhop of Wincheſter* v. *Knight* (*a*), alſo cited in the caſe in *Atkins*, the Lord Chancellor ſays, the tenant is a ſort of fiduciary to the lord; and it is a breach of the truſt, which the law repoſes in the tenant, for him to take away the property of the lord. It is clear, that in that caſe the Lord Chancellor, who directed an action to be brought, to aſcertain the legal right, muſt have meant, that if it was found, that the copyholder had no right to take the ore, an account muſt have been rendered in this court, though in the caſe of the heir ariſing from his own perſonal act of waſte. There muſt have been a diſcovery; and relief would have been incidental.

There is a variety of caſes of copyholders coming for relief in caſes of waſte. The reſult is, that he cannot be relieved, where the waſte is wilful after notice. That relief can be given only upon an account and ſatisfaction. The Lord might bring trover; for it is his property. The mutual right in the tree is rather in favor of the juriſdiction of this Court. He is accountable for part to another perſon; and he has a right to uſe it as to his own intereſt in it. There are many caſes, where, though it is no waſte at law, an unconſcientious uſe has been made of the property. In *Peachy* v. *The Duke of Somerſet* (*b*) no relief was given, becauſe the waſte was wilful. The Court took notice, that they will not relieve without equitable circumſtances; which proves the juriſdiction. That is the doctrine of the earlieſt times. *Commin and Kingſmell's Caſe* (*c*). *Thomas* v. *The Biſhop of Worceſter* (*d*); where the lord having ſeiſed for wilful waſte by cutting timber, an iſſue was directed, *quo animo* it was cut. *Naſh* v. *The Earl of Derby* (*e*); *Cox* v. *Thiſgood* (*f*); where the Lord Keeper ſaid, he thought the rules of Equity not ſo ſtrict, but that relief might even be given againſt voluntary waſte and forfeiture. If the plaintiff ſhould bring an ejectment, it is doubtful, whether this Court would not relieve upon the ground, that being done under a pretence of right, it is not wilful waſte. It would be very difficult upon two or three trees, which may be a very material loſs, to perſuade a

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(*a*) 1 *P. Will*, 406.
(*b*) *Pre. Ch.* 568.
(*c*) *Tot.* 46. Edition 1649. cited 6 *Vin.* 152.
(*d*) 1 *Ch. Ca.* 95 6 *Vin.* 152.
(*e*) 2 *Vern.* 537.
(*f*) 1 *Eq. Ca. Ab.* 121.

jury, that it is a forfeiture. A diſcovery may be neceſſary for an action of trover. The ground of juriſdiction is ſtronger in this caſe than in any of the others. A part of the object of this bill is an account of timber aſſigned and miſapplied. The remedy as to that is wholly in Equity. There is perhaps no caſe nearer this than one noticed in *Mitford* (*a*); where it is laid down, that a Court of Equity will prevent the aſſertion of a doubtful right in a manner productive of irreparable injury. Therefore, where the tenants of a manor claiming a right of eſtovers cut a great quantity of timber of great value, their right being doubtful, the Court entertained a bill at the ſuit of the Lord to reſtrain the aſſertion of it.

Mr. Manſfield and Mr. Pemberton for the defendant—No ſuit was ever inſtituted more frivolous and vexatious than this. This copyhold eſtate conſiſts of arable land of the annual value of about 10*l.*, with no houſe upon it. According to this doctrine, if the Lord is entitled to the whole tree, he may come here for an injunction to reſtrain the tenant from ſhrouding and lopping and for an account of the damage. The law has particularly pointed out the remedy. He may get the whole eſtate, if the tenant commits waſte; which is a ſufficient reſtraint; and this courſe is totally changing the mode of inquiry. In caſes of wilful waſte this court would not relieve. If the law is, as now contended, the caſe muſt have exiſted.

The Solicitor General (amicus curiæ) ſaid, that in the cauſes of *Stoner* v. *Strange* and *Stoner* v. *Whiting* (*b*) the body of the tenants upon the plaintiff's manor claimed a right to cut timber for eſtovers. The bill was filed, firſt, againſt ſome tenants, who had done it, and afterwards againſt all the tenants; and an account was decreed.

No action of waſte by the Lord againſt a copyholder. *Qu.* Whether upon waſte by a copyholder by cutting timber the Lord can bring trover; particularly where by the cuſtom the right to the tree, when cut, is in both. The caſe of Lord and tenant is not like that of tenant for life and the remainder-man. Their rights are upon the ſame ground; and the reverſioner enters for the forfeiture: but the Lord muſt have it preſented by the homage.

LORD CHANCELLOR—Suppoſe a caſe, in which the eſtate is not worth the timber, that was growing upon it, and which is cut down by the tenant. Could the Lord bring an action of

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(*a*) *Mitf.* 123.

(*b*) In *Chancery*, *Michaelmas* 1767. *Hilary* 1768. *Mitf.* 123.

waſte? I apprehend, there can be no action of waſte between the Lord and tenant. The Lord can get no more than the forfeiture. I doubt, whether he could bring trover; particularly in this caſe; the Lord and tenant both having a right to the timber, when cut.

The reaſoning aſſumes, that, where a bill lies for an injunction, in conſequence of that the Court will proceed as to the right to the timber cut down. But my great doubt is, whether there ought to have been an injunction. In all caſes, where an injunction to ſtay waſte is granted, if waſte is committed, there is an action of waſte. The law ſettles the matter between the Lord and tenant. If by committing waſte a forfeiture is incurred, the Lord proceeds for the forfeiture; and it is a queſtion at law, whether the act done is a forfeiture, or not? A tenant for life and the reverſioner have parts of the ſame eſtate given by the ſame will or ſettlement. Their rights are upon the ſame ground; and the reverſioner enters for the forfeiture of the eſtate for life. The Lord has no right of entry. He muſt have the forfeiture preſented by the homage. I do not find any precedent to lead me; and my doubt is, whether I ſhould not do an exceedingly miſchievous thing inſtead of a beneficial thing to juſtice by entertaining this ſuit. It would bring into this court by bill every little conteſt between the Lord and a particular tenant upon the nature of their rights. If I let this cauſe ſubſiſt, I ſhall ſet a firebrand in the county of *Hampſhire*. If I could entertain the ſuit, I muſt direct an iſſue, *quantum damnificatus*; for I would not determine upon the depoſitions, whether the ſhrouding and lopping has been ſuch as will hurt the tree, or not. I would not decree an injunction without directing that iſſue; whether the manner, in which the trees have been lopped, is pernicious. Then as to the timber ſold, there muſt be another iſſue; whether it was cut without licence.

The Lord Chancellor afterwards ſaid, that thinking the caſe extremely oppreſſive he was inclined to diſmiſs the bill with coſts; and therefore ought to hear the evidence.

The evidence was accordingly read; and the Attorney General obſerved, that by the anſwer the defendant ſtates, that he ſold the timber for 17*l.* 14*s.* but according to the evidence he ſold timber for fifty guineas; which could not poſſibly be the ſame.

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DENCH *v.* BAMPTON.

The Lord Chancellor ſaid, that ſo much was to be applied in repairs; the remainder belonged to the Lord and tenant according to the cuſtom; and the defendant ſelling the whole had with his own ſold the plaintiff's; who might bring an action for the money; that upon the evidence the fact muſt be ſo taken: the defendant ſwearing poſitively, that no more than the fourteen trees aſſigned were cut; and the evidence not diſproving that; which might eaſily have been done.

The bill was diſmiſſed with coſts.

BROWN *v.* HIGGS.

Rolls. *April* 11. 15. *July* 1.

Teſtator bequeathed a leaſehold eſtate (after an eſtate for life) to his nephew *A.* and the heirs male of his body lawfully begotten, and in default of ſuch heirs to one of the ſons of his nephew *B.* as *A.* ſhall direct by a conveyance in his life or by his laſt will. Another leaſehold eſtate he bequeathed to *A.* upon truſt, ſubject to certain charges, to employ the remainder of the rent to ſuch children of *B.* as *A.* ſhall think moſt deſerving and that will make the beſt uſe of it, or to the children of his nephew *C.* if any ſuch there are or ſhall be. *A.* dying in the teſtator's life, the bequeſt of the latter eſtate was eſtabliſhed in favor of all the children. *Quære* as to the former?

General reſiduary clauſe paſſes all, that is not ſufficiently diſpoſed of, as in caſe of lapſe.

HENRY BROWN by his will, dated the 13th of *January* 1795, and duly executed to paſs real eſtate, reciting, that by indentures executed before his marriage he had ſettled upon his wife *Rupertia Brown* his eſtate at *Lower Swell*, to receive the rents and profits after his deceaſe for her life, to prevent all diſpute he gave and bequeathed to his ſaid wife the ſaid eſtate at *Lower Swell* for her natural life, to receive the rents and profits thereof for her own uſe without being accountable to any one. After her deceaſe he gave and bequeathed the above-mentioned eſtate at *Lower Swell* to his nephew *John Brown* and to the heirs male of his body lawfully begotten, "and in default of ſuch heirs to one of the ſons of "my nephew *Samuel Brown* as the ſaid *John Brown* ſhall direct "by a conveyance in his life time or by his laſt will and teſtament."

The teſtator alſo gave and bequeathed unto his nephew *John Brown*, in truſt nevertheleſs for the uſes after mentioned, his eſtate at *Brize Norton*; both which eſtates he declared were held by leaſe under the Dean and Chapter of the Cathedral Church of *Chriſt*, *Oxford*: that is to ſay, to permit his ſaid wife *Rupertia* to receive all the arrears of rent due to him in his life, and the next half-yearly payment after his deceaſe, ſubject to the annual rent to the College; and alſo to permit the tenants of the *Parſon-*

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S.C. see vol. 5. p. 495. on rehearing & decree affirmed. This was at the Rolls. But there was an appeal thereon to Lord Chr. Eldon & he in 1803. affirmed the decree, though with some appearance of doubt. see vol. 8. p. 570.

age Farm to pay to her yearly and every year during her natural life (except the years the leaſes for both the ſaid eſtates are renewed, and the fines paid) the ſum of 100*l.* *ſterling*, at four quarterly payments, to begin the firſt quarter-day after the ſaid half-yearly payment to his wife after his deceaſe; and he authorized and commanded his ſaid nephew *John Brown* to let the two eſtates at *Brize Norton*, as often as occaſion ſhall offer, to the beſt advantage, and to apply the rents and profits to pay the rent and fines, as they ſhall become due, to keep the buildings in repair, to pay the principal and intereſt of the money owing upon his eſtate at *Lower Swell* and the *Grange* Farm at *Brize Norton*: then, ſubject to two legacies of 200*l.* and 100*l.* and ſome other charges, the teſtator made the following diſpoſition as to the eſtate at *Brize Norton*:

" After the above truſt is performed, I authorize and empower
" my ſaid nephew *John Brown* to receive the remainder of the
" rent, that ariſes from my eſtate at *Brize Norton*, over and above
" the 100*l.* I have directed to be paid to my loving wife
" *Rupertia Brown*, and to diſpoſe of it in the following manner:
" that is to ſay, to take 100*l.* of it every year to his ſole and
" ſeparate uſe, and to employ the remainder of the ſaid rent, after
" paying the annual rent to the College and the fines for the
" renewal of the leaſes and other neceſſary expences about the
" farms, to ſuch children of my nephew *Samuel Brown* as my
" ſaid nephew *John Brown* ſhall think moſt deſerving and
" that will make the beſt uſe of it or to the children of my
" nephew *William Auguſtus Brown* if any ſuch there are or ſhall
" be."

The teſtator gave and bequeathed to his wife all his plate, china, houſehold goods, cattle, and chattels of what nature and kind ſoever they be, and every individual he ſhould be poſſeſſed of at his deceaſe, that is not otherwiſe diſpoſed of above; and he appointed his wife *Rupertia* to be the reſiduary legatee and ſole executrix.

The teſtator died without iſſue ſoon after the execution of his will. *John Brown* died in the teſtator's life; leaving a ſon and two daughters. *Samuel Brown* alſo died in the teſtator's life; leaving the following children; *Henry Valentine Brown*, who was heir

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heir at law to the teſtator, *Ann Wheeler*, *Martha Brown*, *Samuel Brown*, *Thomas Valentine Brown*, and *Charles Brown*. The widow of the teſtator married *Charles Higgs*. *William Auguſtus Brown*, who was unmarried at the hearing of the cauſe, and *Maria Sparrow* were the next of kin of the teſtator, being his only ſurviving nephew and niece.

The bill was filed by the children of *Samuel Brown* againſt *Charles Higgs* and his wife, and the next of kin; praying, that the will may be eſtabliſhed; that an account may be taken of the rents and profits of the *Brize Norton* eſtate, received by the defendant *Higgs* and his wife; and that what may be due upon that account and the future rents and profits may be applied in diſcharge of the money due upon the *Lower Swell* eſtate and the other charges according to the will; and that the ſurplus may be paid to the plaintiffs equally, or in ſuch proportions as the Court ſhall direct; and that an account may be taken of the perſonal eſtate of the teſtator, with the uſual directions.

The defendant *Higgs* and his wife by their anſwer ſubmitted, that the whole of the ſaid premiſes became veſted in *Rupertia Higgs*; and that ſhe and her huſband in her right are entitled thereto free from any limitation made or intended by the will.

The next of kin by their anſwer ſubmitted, that, if the ſurplus rents and profits of the *Brize Norton* eſtate are to be conſidered as perſonal eſtate undiſpoſed of, they are entitled as next of kin.

There had been ſome diſpute, whether the eſtate at *Lower Swell* was real eſtate, or leaſehold: but it was agreed at the hearing, that it was leaſehold; being the remainder of a term of 1000 years. It was charged with a mortgage for 100*l.* The *Brize Norton* eſtate was alſo ſubject to a mortgage for 450*l.*

Mr. Grant and Mr. Lewis for the plaintiffs—It is contended by the defendants, that the plaintiffs have no intereſt in either the *Lower Swell* or the *Brize Norton* eſtate; a diſcretion being given to *John Brown*; which by his death in the life of the teſtator is at an end, and cannot be exerciſed. The only ground taken is, that for want of a poſſibility of exerciſing the diſcretion the bequeſt muſt fail. It is clear, in a court of equity a bequeſt never fails by the death of the truſtee. His intereſt, if he had ſurvived the teſtator, makes no difference: with regard to the power of diſpoſition he is a mere truſtee. The diſpoſition to him of the *Lower Swell* eſtate is lapſed; therefore the next is to take effect. In every ſuch caſe, where the diſcretion cannot be exerciſed, the power devolves upon the Court, wherever the objects are ſo pointed out, that the Court can make a diſtribution among them. The Court will not ſelect one: but where the claſs is deſcribed, out of which the ſelection is to be made, and the perſon, who is to make it, is dead, the Court will divide it among them all. The ſame doctrine applies to both eſtates. *John Brown* might certainly have appointed to any of the children in excluſion of the reſt: but the Court muſt make an equal diviſion among them all. The addition with reſpect to the *Brize Norton* eſtate as to the children of the other nephew may make ſome doubt, whether, as he has no children now, the Court will wait to ſee, whether he will have any, and whether the diſtribution might not extend to them alſo, or the whole is to go to the plaintiffs; who appear to be the preferable objects of the teſtator's bounty. The intention was, that if none of the children of *Samuel* ſhould appear to *John Brown* to be deſerving, then he ſhould give it to the children of the other nephew. It is very doubtful, whether he could have been compelled to execute the power during the life of *William Auguſtus Brown*. As to the *Brize Norton* eſtate, the rents and profit ought to be accounted for and ſecured, if the Court is of opinion, that the children of *William Auguſtus Brown* may be entitled, and that it will be uncertain till his death.

That the diſpoſition is not void by the death of the truſtee has been decided by many caſes. In *Harding* v. *Glyn* (*a*) a diſpoſition in words almoſt the ſame as this was held a truſt; and, the truſtee having made a different diſpoſition by will, it devolved upon the Court; and the deſcription being "*relations*", the Court diſtributed it among the next of kin. In that caſe there was as much a diſcretionary power and a perſonal diſcretion as in this. *Doyley* v. *The Attorney General* (*b*) is full as ſtrong as this; and another caſe

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(*a*) 1 *Atk.* 469. (*b*) 4 *Vin.* 485.

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equally ſtrong is cited there. *Maſon* v. *Limbrey* (a), *Witts* v. *Boddington* (b).

Mr. Graham for the defendants Higgs and his wife—There can be no doubt as to the *Lower Swell* eſtate, from the manner, in which the diſpoſition is expreſſed, that one perſon, who is the object, not being ſingled out, it is lapſed; that perſon requiring the nomination of another; who died in the teſtator's life. It is a power coupled with an intereſt; and therefore to be conſtrued liberally, according to Lord *Mansfield*'s diſtinction in *Zouch* v. *Woolſton* (c). In *Harding* v. *Glyn* it was clear, the relations generally were the object; and the only power was to ſingle out one or ſome of them. The diſcretion was confined to that. One part only of the intention failed: but the general intention of the teſtator remained; which was in effect an intention to die inteſtate as to that property, unleſs his wife ſhould ſingle out ſome relations and exclude the reſt; the Court having there determined, that "relations" meant next of kin. There is a marked diſtinction between that caſe and this. So in *Witts* v. *Boddington* it was perfectly clear, the grandchildren generally were the objects of the teſtator's bounty. In ſuch caſes the Court ſees its way diſtinctly. The caſe cited from *Viner* went upon the ſame ground: the children and the Charity were the clear diſtinct objects. So in *Maſon* v. *Limbrey* the Court gave the fund according to the general deſtination; ſeeing no qualification annexed to it. In this caſe there is no general intention in favor of all the children of *Samuel Brown*. The diſpoſition of the *Lower Swell* eſtate points to one ſon, not all. The teſtator indiſputably meant a choice; and it is not like a general diſpoſition in favor of the family of *A.*; the mode depending upon another perſon: but in this caſe without a choice there is no deſcription of the perſon to take. Where one only is to take, it cannot be ſaid, all are to take. Then who is to make the ſelection? The perſon to exerciſe that diſcretion being gone, it muſt fail. Where the gift is to one, the general intention and the modified intention are the ſame; the only difference being in the power of ſelection given to another perſon. This being a leaſehold eſtate alſo, the limitation over after the limitation to the heirs male of the body of *John Brown* is void.

(a) Cited in *The Duke of Marlborough* v. *Lord Godolphin*, 2 *Veſ.* 67.
(b) 3 *Bro. C. C.* 95.
(c) 2 *Burr.* 1136, ſee alſo 2 *Veſ.* 79.

As to the point upon the other eſtate, *John Brown* might have known, which of the children of *Samuel* were moſt deſerving: this Court cannot know that. There is however more in that point. It would have been impoſſible to get out of the authorities, had it ſtood as a diſpoſition to the children of *Samuel Brown* only, without the alternative: but it is to be given to the one claſs or the other, clearly in the disjunctive. It is abſolutely impoſſible to conſtrue it otherwiſe. The word "*or*" cannot in this inſtance be conſtrued copulatively, "*and*" (*a*). *John Brown* might have given to the children of *William Auguſtus Brown*, to the excluſion of the children of *Samuel*. If ſo, the Court muſt conſtrue it diſjunctive; and the event cannot alter the conſtruction. This then does not come within the caſes; for the Court is perfectly at a loſs to ſay, to which claſs it ſhall go; and can ſee no marked intention in favour of either.

Mr. Stratford for the defendants Higgs and his wife—All the caſes cited are, where the fund is given to certain perſons diſtinctly pointed out or for ſome particular purpoſes. Caſes upon diſpoſitions to charitable uſes differ a good deal from others; for though the charity is not defined, it is conſidered as a gift to a charity; and upon that diſtinct principle Lord *Thurlow* determined *Moggridge* v. *Thackwell* (*b*). *John Brown* could not delegate this power. Then how can the Court exerciſe it? That the Court cannot, is determined in *Maddiſon* v. *Andrew* (*c*). In *The Duke of Marlborough* v. *Lord Godolphin* (*d*) Lord *Hardwicke* takes notice of the caſes, that have been cited on this occaſion; and gives this general anſwer to them; that they are all caſes, where the bequeſt amounted to a legacy to all the children. In all of them ſpecific perſons are pointed out. In that caſe the Court refuſed to aid a defective execution of a power; which makes it ſtill ſtronger; and no caſe contradicts that, except *Moggridge* v. *Thackwell*; which goes upon the diſtinction as to charities; which are peculiarly under the direction of the Court, and are carried farther than any other caſes; and another particularity in that caſe

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(*a*) See *Maberly* v. *Strode*, *ante*, vol. 3. 450, and other caſes, where the ſame conſtruction was made, referred to in the note 452.

(*b*) *Ante*, vol. 1. 464. 3 *Bro. C. C.* 517. Upon the application of the doctrine of *Cy pres* to Charities ſee *Corbyn* v. *French*, *ante*, 418. *The Attorney General* v. *Bowyer*, *ante*, vol. 3. 714; and *The Attorney General* v. *Andrew*, *ante*, vol. 3. 633; where the principal caſes are referred to.

(*c*) 1 *Veſ.* 57.

(*d*) 2 *Veſ.* 61.

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is, that it was upon a reſidue. Whoever takes under the will muſt take according to the diſcretion of the perſon deſcribed; who is not in exiſtence to exerciſe that diſcretion. It is mere miſapplication to ſuppoſe, that it devolves on the Court. The inſtances, in which the Court acts, are, where the truſtee becomes an ideot; or miſconducts himſelf, &c.; but the Court has in no inſtance taken upon itſelf the execution of the power, where the party, to whom the power was given, is out of exiſtence, and was ſo in the life of him, who gave it. *Witts* v. *Boddington* could admit no doubt. It is clear, as long as there was a grandchild, that grandchild muſt have taken. In the caſes, where the diſpoſition is to relations, all, that the Court has done, has been to lay hold of the *Statute of Diſtributions* (*a*) and give it to the next of kin. What is the conſtruction of the expreſſion as to the *Brize Norton* eſtate, "*the remainder of the rent?*" The rent received by *John Brown*. The word "*employ*" marks a perſonal truſt in him. *The Duke of Marlborough* v. *Lord Godolphin* is deciſive, and Lord *Hardwicke*'s argument; who is to ſay, which are the children, to whom Lady *Sunderland* would have appointed? *Harding* v. *Glyn* is mainly relied on; and, I agree, it preſſes moſt: but it turned upon the effect of the word "*deſire*;" whether it ſhould be conſidered recommendatory or juſſory (*b*); and all thoſe caſes were conſidered in *The Duke of Marlborough* v. *Lord Godolphin*; and ſuppoſing them to be in point to this purpoſe, they were there contradicted, not lightly, but upon full conſideration. It is a fallacy to ſay, the Court executed the power, where ſeeing the intention in favour of the children, they gave it to all.

Mr. Steele for the next of kin ſubmitted, that if the Court ſhould be of opinion, the plaintiffs could not take theſe eſtates under the will, then it is not given as part of the reſidue to *Mrs. Higgs*; as it is impoſſible to imagine, that the teſtator, when he gave that reſidue, did not imagine, he had diſpoſed of both theſe eſtates to particular claſſes of perſons; and therefore diſpoſing of the reſidue he could not mean to include them in that.

To this it was anſwered, that the ſame argument had been attempted in *The Duke of Marlborough* v. *Godolphin*.

(*a*) 22 & 23 *Char.* 2. c. 10. 29 *Char.* 2. c. 3.

(*b*) See the caſes collected in Mr. *Sanders*'s note; and *Bull* v. *Vardy*, *ante*, vol. 1. 470. and *Malim* v. *Keighley*, *ante*, vol. 2. 333; 529.

The Maſter of the Rolls during the argument for the defendant aſked, if *Samuel Brown* had left only one child, whether that child would not have taken; obſerving, that there could be no ſelection there. It was anſwered, that the teſtator had not that caſe in contemplation; and that ſuch ſon could not take: the preceding limitation being out of the way, and the limitation over not being to any preciſe perſon exiſting, it is different from a preciſe limitation to another perſon.

Mr. Grant in reply—The reſult of the argument for the defendants is, that both theſe diſpoſitions import a ſelection of particular objects, not a bounty to the whole claſs of perſons deſcribed; that the ſelection cannot now be made by the perſon appointed to make it; and therefore cannot be made at all; the Court having no authority to exerciſe the power, or to give it generally to the whole deſcription of perſons, out of whom the ſelection is to be made. My propoſition is, that this Court never permits any truſt to fail through the defect of the perſon to execute the truſt. No caſe has been cited to ſhew, that a power of appointment or a truſt has ever failed by the death of the party, who is to execute the truſt or exerciſe the power. The caſes produced are only, where a power has been exerciſed in a certain manner, and the Court has refuſed to interfere and correct or vary the diſpoſition made by the party; as in *The Duke of Marlborough* v. *Lord Godolphin*; where there was no failure of the perſon to exerciſe the power. It was exerciſed. An appointment had been made. The application to the Court was upon the ground, that part was ill appointed, and deſiring the Court to interfere and make a new appointment. The application was to counteract and control the appointment. In this caſe nothing is given; and the queſtion is, whether the truſt ſhall totally fail: whether the objects of the teſtator's bounty ſhall take nothing. In the caſe put by the Court, that *Samuel Brown* had left only one child, they go the full length of ſaying, that child could have taken nothing; contending, that no one can take except through the appointment of *John*: yet in that caſe it would have been reduced to a certainty; and it is quite impoſſible to maintain the propoſition. The caſes cited for the plaintiffs equally import ſelection. Where the diſpoſition was to the moſt deſerving, all could not be intended. The Court may ſay in this caſe, either the power ſhall fail altogether, or the eldeſt ſon ſhall take, or all ſhall take. It would be no ſtrain to ſay, the eldeſt ſon ſhall

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ſhall take; for he would naturally be preferred, if there was no objection to him. In *Maddiſon* v. *Andrew* Lord *Hardwicke* does not ſay, the power does not devolve on the Court. He ſays, powers have devolved on the Court by the non-acting, miſbehaving, or death, of truſtees. The perſon is much more certain in this will than in thoſe I have mentioned, where the gift was to the moſt deſerving relations. No caſe has been produced, where the Court under theſe circumſtances has refuſed to exerciſe the power; and ſeveral have been ſtated, where the Court has exerciſed it. The Court is called upon to ſay, that in every ſuch inſtance the diſpoſition falls to the ground; though the object is diſtinct, and there is no ulterior diſpoſition. The will would be completely diſappointed; and the rule, that by the death of a truſtee the truſt never fails, an accident the Court always endeavours to prevent, would be ſhaken. The true doctrine is, that neither the impoſſibility, refuſal, nor neglect, to execute it ſhall affect thoſe, ſome of whom were certainly intended to be benefited; and though by diſtributing it among the claſs ſome will be benefited, who probably would not, if the power had been executed, that is not ſuch a deviation from the intention, as if it ſhould totally fail; for there is clearly a general kindneſs to theſe objects. Some are intended to be benefited: whereas upon the other principle it will go quite to other objects.

The caſes of Charities, I admit, do not apply; for the Court has gone lengths upon that ſubject, which they will not in other caſes: but in thoſe caſes the propoſition is laid down generally, that a truſt ſhall not fail, becauſe there is no truſtee; and though that doctrine has moſt frequently occurred in Charity caſes, it is not confined to thoſe caſes; and the reaſoning is general; upon the intention, that ſome Charity ſhall have the benefit. That reaſoning as to the intention applies to the other caſes and to this mode of diſpoſing of any other property.

Maſter of the Rolls—With reſpect to the point between the defendants, it is too clear in favour of the reſiduary legatee. The next of kin contend, that this is not ſufficiently diſpoſed of: but the teſtator has given to the reſiduary legatee all, that is not ſufficiently diſpoſed of. If he has not perfectly diſpoſed of it, then ſhe takes it. No man ſuppoſes, his legacies will lapſe, or will not take place. It is the caſe of all lapſed legacies (*a*).

With

(*a*) *Shanley* v. *Baker*, post 732. *Kennell* v. *Abbot*, poſt. 802.

With reſpect to the other point, as to the latter bequeſt I think, under the authority of *Harding* v. *Glyn* it is only a gift to the children of *Samuel Brown* and *William Auguſtus Brown*, or to ſuch of them as *John Brown* ſhall think moſt deſerving, if he thinks any more deſerving than another: if he thinks no one more deſerving than another, then it is to go to all, unleſs that is over-ruled by *The Duke of Marlborough* v. *Godolphin*. I ſhould give that opinion, that it is to go to all, if it were not for the former part of the will as to the *Lower Swell* eſtate; as to which my great doubt is upon *The Duke of Marlborough* v. *Godolphin*, whether the teſtator intended any of the ſons of *Samuel Brown* to take except ſuch one as ſhould be ſelected by *John*. It is clear, that if *John Brown* had ſurvived the teſtator, in no caſe, that could happen, could this power have been exerciſed; for the limitation over of this leaſehold property in default of heirs male of his body would have been abſolutely void (*a*): but in the event, that has happened it is not void; all the limitations as to perſonal eſtate being clearly good, until one veſts, carrying the whole intereſt (*b*). The queſtion is, whether there was any definite intention, that all the ſons of *Samuel Brown* ſhould take this eſtate. If *John Brown* had made a diſpoſition to all, it would have been void. He was obliged to ſelect one. He had power, if he thought fit to give it to any one ſon; and if he had gone beyond that, it would not have been well executed. But I have ſo much doubt upon that, that I will not determine this without making a caſe for the opinion of a court of law, if that is thought fit. I cannot with ſatisfaction determine it without aſking that opinion. If that is waived, I ſhould determine as to the other eſtate, that it falls exactly within the caſe of *Harding* v. *Glyn*; that if none are more deſerving than another, it is a gift to them all. I cannot diſtinguiſh it from that caſe. I can find words of gift as to the one eſtate, but not as to the other; with reſpect to which the caſe of

All limitations of perſonal eſtate may be good, until one veſts, carrying the whole intereſt.

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(*a*) See the caſes collected in Mr. *Cox*'s notes to *Atkinſon* v. *Hutchinſon*, 3 *P. Will.* 262 and Mr. *Sanders*'s notes to *Beauclerk* v. *Dormer*, 2 *Atk.* 308. *Fearne's Executory Deviſes*, 167, *&c. Ed.* 4, by Mr. *Powell*. *Jacobs* v. *Amyatt*, 4 *Bro. C. C.* 542. *Evereſt* v. *Gell*, and *Chandleſs* v *Price*, *ante*, vol. 1. 286.; vol. 3. 99.

(*b*) See Mr. *Cox*'s note upon *Higgins* v. *Dowler*, 1 *P. Will.* 98, and *Phipps* v. *Lord Mulgrave*, *ante*, vol. 3. 613. Each limitation muſt be underſtood to be in its creation ſo limited, that it muſt take effect, if at all, within the limits allowed: *viz.* 21 years after lives in being.

The Duke of Marlborough v. *Lord Godolphin* has changed my opinion.

The parties declining the propoſal for a caſe as to the *Lower Swell* eſtate, and preſſing for the deciſion of the Court, the Maſter of the Rolls ſaid, he would conſider of it.

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Maſter of the Rolls—The only queſtion in this cauſe, that is now ripe for judgment, is as to the *Brize Norton* eſtate, with reſpect to ſo much of the intereſt in that eſtate as is not peculiarly appropriated by the will. The point as to the *Lower Swell* eſtate is not now ripe for deciſion. As to that there is no occaſion to make any declaration now; becauſe *Rupertia Higgs*, to whom the rents and profits of that eſtate are given for her life, is now living. It will be time enough at her death to decide that queſtion. The fact being, that *John Brown* died in the life of the teſtator, a queſtion may ariſe, whether anything veſted in him or his heirs male. Probably it may be held lapſed, as being an abſolute intereſt in *John Brown*, if it is leaſehold eſtate (*a*). Suppoſing it to be real eſtate, the queſtion will be, whether the limitation to one of the ſons of *Samuel Brown* in default of heirs male of the body of *John Brown* can be conſtrued a gift to all the ſons, or merely to ſuch ſon as *John Brown* ſhould appoint; in which caſe it would fail. I deſire not to be underſtood to give any opinion upon that point.

The next queſtion, as to the *Brize Norton* eſtate, is, whether the ſurplus rents, after the charges impoſed by the will, ſo given to ſuch children of *Samuel Brown* as *John Brown* ſhall think moſt deſerving, and that will make the beſt uſe of it, or to the children of *William Auguſtus Brown*, if any ſuch there are or ſhall be, is a gift

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(*a*) See *Brett* v. *Rigden*, *Plow.* 340. 10 *Mod.* 98; 99. *Goodright* v. *Wright*, 1 *P. Will.* 397. *Avelyn* v. *Ward*, 1 *Veſ.* 420; particularly 423. *Hopkins* v. *Hopkins*, *For.* 44. 1 *Vern.* 268. 1 *Atk.* 581. 1 *Veſ.* 268. Mr. *Butler*'s note, 231, *Co. Lit.* 271. *b.* 2 *Term. Rep. B. R.* 251. *Hodgſon* v. *Ambroſe*, *Dougl.* 337. *Ed.* 2. *Warner* v. *White*, *Dougl.* 344. *n.* 4. *Ed.* 2. *Fearne's Cont. Rem.* 360. *Exec. Dev.* 392, &c. *Ed.* 4. The rule extracted from theſe authorities as to real eſtate is, that a ſubſequent conditional limitation over, whether by way of remainder or executory deviſe, ſhall take place, if the precedent limitation, by what means ſoever, is out of the caſe. The ſame rule holds as to leaſehold and perſonal eſtate: *Jones* v. *Weſtcombe*, 1 *Eq. Ca. Ab.* 245. *Andrews* v. *Fulham*, 2 *Str.* 1092. 1 *Veſ.* 421. 1 *Wilſ.* 107. 5 *Bur.* 2624. *Fonnereau* v. *Fonnereau*, 3 *Atk.* 315. The analogy is alſo preſerved in the rule, that all executory limitations of a term for years or of perſonal eſtate are, if not void in their creation, capable of taking effect, until a prior limitation, carrying the whole intereſt, becomes veſted.

gift to all the children, or to ſuch of them only as the teſtator's nephew *John Brown*, who died in his life, ſhould appoint. If the former can be collected as his intention, the death of the truſtee will make no difference. If that intention cannot be collected, the ſelection not having taken place, whatever the reaſon of its failing may be, the bequeſt muſt fail with it. Upon the true conſtruction of this will I am of opinion, it is equivalent to ſaying, he gives it to the children of *Samuel Brown* or of *William Auguſtus Brown*, with a power to *John Brown* to ſelect any he thinks fit and to exclude the others; and it is too much to contend, that nothing is intended for them excluſive of the appointment of *John Brown*. The fair conſtruction is, that at all events the teſtator meant it to go to the children; and theſe words of appointment he uſed only to give a power to *John Brown* to ſelect ſome and exclude the others.

I will make no declaration as to the *Lower Swell* eſtate: and I deſire, that this declaration ſhall not be conſidered as at all affecting that. They ſtand upon very different grounds; and at preſent I am inclined as to the *Lower Swell* eſtate againſt the children of *Samuel Brown*. The one is given to certain objects, with a power to another perſon to diſtribute it among ſuch of them, as he thinks moſt deſerving; which does not exclude them, if that power is not exerciſed. The other is a gift to ſome one as that perſon ſhould appoint.

The decree declared, that in conſequence of the death of the teſtator's nephew *John Brown* in the teſtator's life-time the rents of the eſtates at *Brize Norton* ſubject to the truſts thereof declared by the will were thereby well bequeathed in truſt for all the children of the teſtator's nephew *Samuel Brown* and the children of his nephew *William Auguſtus Brown*, if any ſuch there are or ſhall be; and an inquiry was directed, what children of *Samuel Brown* and *William Auguſtus Brown* reſpectively were living at the death of the teſtator, and what children are now living; and the conſideration of all farther directions as to the *Lower Swell* eſtate was reſerved.

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Though payment of a ſubſtantial part of the purchaſe-money will take an agreement as to land out of the *Statute of Frauds* on the ground of part-performance, payment of a ſmall part, as 5 guineas, the purchaſe-money being 100, will not do. The plea of the *Statute* was allowed; with an intimation from the Court, that under the circumſtances of the caſe the bill would be diſmiſſed with coſts.

THE bill ſtated, that under an Act of Parliament for incloſing certain lands in the county of *Lincoln* part of the premiſes were on the 2d of *April* 1793 allotted to the defendant in reſpect of a right of common, to which he was entitled. The plaintiff on or about the 2d of *April* treated with the defendant for the purchaſe of his allotment for the ſum of 105*l.*; and the plaintiff agreed to purchaſe the ſame of him at that price; and thereupon paid to the ſaid defendant the ſum of 5*l.* 5*s.* in part of the ſaid ſum of 105*l.*

The bill charged theſe facts; and that *William Stanger*, a neighbour of the defendant, in whoſe preſence the money was paid, before the defendant agreed to ſell the ſaid allotment to the plaintiff, deſcribed to the defendant where it lay; and the defendant upon receiving ſuch information from *Stranger* agreed to ſell the ſaid allotment to the plaintiff and accepted the ſaid ſum of 5*l.* 5*s.* in part of the ſaid purchaſe-money of 105*l.*; alſo, that the defendant had endeavoured to prevail upon the plaintiff to receive back the ſaid ſum of 5*l.* 5*s.*

The bill, which was filed upon the 18th of *March* 1793, prayed a ſpecific performance of the agreement. The plea of the *Statute of Frauds* was put in in *December* 1793; and from that time no ſtep was taken till very lately; when the plea was ſet down to be argued.

Mr. Romilly in ſupport of the plea—This agreement is not in writing; and no circumſtance of part-performance is alleged except payment of five guineas, part of the purchaſe-money. The only queſtion is, whether payment of a ſmall ſum of money, as part of the purchaſe-money, as earneſt, will take the caſe out of the *Statute.* It has been decided, that it will not: *Lord Fingal* v. *Roſs* (*a*), a caſe often cited. *Seagood* v. *Meale* (*b*). *Leak* v. *Morrice* (*c*), which was very ſoon after the *Statute*, was not decided upon the earneſt, but upon this, that the agreement was to

(*a*) 2 *Eq. Ca. Ab.* 46. the name of *Lord Pengall* v. *Roſs.*
(*b*) *Pre. Ch.* 560.
(*c*) 2 *Ch. Ca.* 135.

be put into writing. There are much earlier caſes, and even before the *Statute*, in which the Court refuſed to execute a parol agreement upon the payment of a ſmall ſum of money. *Simmons* v. *Cornelius* (a). In *Tothill* 85 the bill was to be relieved concerning a promiſe to aſſure land of inheritance: but becauſe there was no execution thereof but only 55 *s.* paid in hand, the bill was diſmiſſed: *Miller* v. *Blandiſt*, 30 *Jac.* The only caſes are, where ſomething has been done upon the credit of the agreement, which will amount to a fraud, if the agreement is not performed; as if money has been laid out, or other acts done, which cannot be undone. The ſuppoſition, that this is a part-performance ariſes from confounding the 17th ſection of the *Statute*, as to contracts for the ſale of goods, with the 3d ſection, concerning lands, in which nothing is ſaid about earneſt or payment in part-performance as an exception.

No caſe can come forward under more favorable circumſtances than this. The bill ſtates, that, the defendant not knowing what his allotment was, a neighbour deſcribed to him where it lay. The plea admits all the facts in the bill to be true, except what it traverſes; and the only fact traverſed by the plea is, that there was an agreement.

Mr. Holliſt for the plaintiff—With reſpect to the objection laſt mentioned, the defendant might enter the plea with the Regiſter; and the plaintiff is no more bound to ſet it down than the defendant. In the Court of *Exchequer* the defendant muſt ſet it down within a limited time.

The ſecond volume of *Equity Caſes abridged* ought not to be cited. The caſe of *Lord Fingal* v. *Roſs* is not to be found in the Regiſter's book. In *Seagood* v. *Meal* the phraſe is, that it was agreed, the payment of the guinea was of no conſequence. The authorities ſince have contradicted that; and upon this principle, that part of the purchaſe-money being received, it is a fraud not to perform the agreement. The defendant's argument would hold, if the whole, or nearly the whole, had been received. This defendant has received 5 *per cent.*

(a) 1 *Ch. Rep.* 128.

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LORD CHANCELLOR—If it can be deemed part of the purchaſe-money, it would do: but upon a guinea, or five guineas, ſomething merely to bind the bargain, it is confounding the two parts of the *Statute*.

There is ſomething alſo in your not having ſet down this plea. You file a bill for a ſpecific performance; and when the defendant has pleaded, you ſtop ſhort upon it. What buſineſs has the defendant to go farther? It is hanging up a perſon upon a purchaſe.

The firſt caſe mentioned, from 2 *Equity Caſes abridged* rather appears ill determined; for that is the acceptance of a fine, upon which a leaſe was to be granted: but in the caſe in *Precedents in Chancery* the point is expreſsly ſtated, and the diſtinction noticed. Payment of part of the purchaſe-money is certainly a part-performance: but this is mere earneſt. If you know of any caſe, where throwing down a guinea upon a bargain for land has taken it out of the *Statute*, you may look into it. It does not belong to the plea, but conſider alſo, whether I ſhould hold this to be a good performance on the part of the plaintiff, when he files his bill, and reſts five years.

July 8. *For the plaintiff*—In *Dickinſon* v. *Adams* (a) the bill was to compel the acceptance of a leaſe under a parol agreement upon a fine of 150*l.* and 16*l.* paid in part of the ſame. The plea was overruled without hearing the Counſel for the plaintiff: and the deciſion appears by the Regiſter's book. If in this caſe there had been an agreement in writing, and it had been ſtated, that five guineas had been paid in part, an account would have been decreed in reſpect of the remainder only; taking into conſideration of courſe the five guineas paid. There is no caſe upon this point. There are caſes before Lord *Hardwicke*; who ſpeaks of payment of part of the purchaſe-money as out of the *Statute*. The two ſections of the *Statute* reſpecting lands and goods are very different in expreſſion: as to the latter it is ſaid, no contract ſhall be good. In that reſpect the contract is deſtroyed. Another circumſtance is expreſſed in the 17th ſection: delivery of part of the goods is an

(a) In *Chancery* 1750, cited from a manuſcript of Mr. *Coxe*.

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exception. So nothing is more notorious than that delivery of poſſeſſion of land takes it out of the *Statute.* That applies as much to the one as to the other. *Lord Aylesford's caſe* (*a*) bears upon it. If the clauſe reſpecting land has the effect now contended, thoſe caſes would not have been decided, that if the parol agreement is confeſſed by the anſwer, the Court will perform it. That is law at this day (*b*). It does not follow in Equity, that the contract ſhall be performed, though it is in writing, though part of the money has been paid, or many circumſtances have taken place. On the other hand, when the defendant has confeſſed the agreement by his anſwer, and no inconvenience has appeared, the Court has performed it. The common practice is to ſtate the agreement generally, without ſaying, whether it is in writing, or not. If a parol agreement is ſtated in the bill, it is not properly matter of plea, but of demurrer. In *Whaley* v. *Bagenal* (*c*) and *Whitchurch* v. *Bevis* (*d*) it was held, that the circumſtances alleged as part-performance were not ſufficient to make a part-performance. If the agreement is ſtated generally, it is neceſſary for the plaintiff to avail himſelf of the *Statute* in ſome way; and the courſe is by plea; for if he confeſſes the agreement, a performance will be decreed. The plea ought not to be to the whole of the bill; for then the Court is to judge upon that plea, whether there are ſufficient circumſtances of part-performance alleged in the bill to ſuſtain the decree in the end: whereas it would be much better determined, when the whole caſe comes out. There will be great difficulty, if it is to depend upon the *quantum* of money paid. The defendant is bound to anſwer the fact, whether the five guineas were not paid in part. In *Hole* v. *White* (*e*) before Lord *Camden,* the defendant by his anſwer denied, that the poſſeſſion was delivered in part-performance, and ſwore, that the plaintiff obtained it wrongfully. I only argue againſt the validity of this as a plea. It will remain for the Court to decide upon the circumſtances, when the cauſe comes to a hearing.

(*a*) 2 *Strange* 783.

(*b*) Since the late caſe of *Moore* v. *Edwards, ante* 23, this point muſt be conſidered very doubtful. The principal caſes upon the *Statute of Frauds* are referred to, *ante,* vol. 3. 39, 40. See alſo *Wills* v. *Stradling, ante,* vol. 3. 378. and the obſervations of the Maſter of Rolls as to part-performance in *Forſter* v. *Hale, ante,* vol. 3. 696.

(*c*) 6 *Bro. P. C.* 45.

(*d*) 2 *Bro. C. C.* 559.

(*e*) Cited 1 *Bro. C. C.* 409.

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LORD CHANCELLOR—How can you get to any thing like a rule upon this to govern all caſes. It is not diſputed, that if part of the purchaſe-money ſubſtantially is paid, that takes it out of the *Statute*. But it is contended, that five guineas are not enough upon the notion of binding the bargain. I take it for granted, that five guineas were paid at the time; whether upon the notion of binding the bargain or on account of the purchaſe-money; they are certainly part of the 100 guineas: but ſo ſmall a part, that it does not indicate any intention to bind the bargain. If half-a-crown was paid, it cannot be denied, that it was part of the 100 guineas. I cannot let the plaintiff put his own conſtruction upon the payment. I muſt conſtrue the nature of it; whether it was on the account of the purchaſe-money or upon the notion of binding the bargain. By the plea the defendant admits the fact, as far as it is well ſtated by the bill. The bill ſtates, that five guineas were paid; and avers, that they were paid as part of the purchaſe-money. It does not ſtrike me, that that was the nature of the tranſaction between the parties. The bill would have ſtated it the ſame way, if five ſhillings had been paid. Allow the plea.

It is eaſy with regard to this particular caſe; for it is much better for you; for I ſhould certainly diſmiſs the bill with coſts upon the circumſtances. The bill ſtates an allotment to the defendant under an *Incloſing Act*; and before he has ſeen his allotment, but being told by a neighbour where it was, a converſation aroſe upon it; and the plaintiff offered 100 guineas, and paid five guineas and then reſts five years. That allotment muſt have been getting better. One thing muſt have happened: it muſt have become incloſed by the neighbours incloſing.

Plea allowed.

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July 2. 8.

DICKS *v.* LAMBERT.

Bequeſt of various particulars, compriſing all the teſtator's perſonal eſtate, to his wife for life: then, after ſpecifically diſpoſing of and charging with legacies certain parts after the death of his wife, he appointed her executrix, ſhe paying his debts and funeral expences; held a reſulting truſt as to the reſidue, there being no farther diſpoſition, and no evidence.

Stock included in a will under the word "ſecurities;" legacies being charged, for which the ſecurities properly ſo called were not ſufficient.

JOHN LEACH by his will, dated the 12th of *December* 1774, and duly executed according to the *Statute of Frauds*, after giving to his brother *Edward Leach*, his heirs and aſſigns, an eſtate in *Chigford* town for ever, and likewiſe giving to his ſaid brother a houſe, garden, and premiſes, in the pariſh of *Chigford*, to him, his heirs and aſſigns for ever, proceeded thus:

"I likewiſe gave deviſe unto *Ann Leach*, my loving wife, the "houſe, garden, and premiſes, wherein I now dwell, in the town "of *Watlington* in the county of *Oxford*, for and during the term "of her natural life. Likewiſe I give, deviſe, and bequeath, unto "*Ann Leach*, my loving wife, all my houſehold goods, ſtock in "trade, caſh, and ſecurities for caſh, book debts, and ſo forth, "of what nature or quality ſoever, for her uſe and benefit for "and during her natural life; and after her deceaſe I give, de"viſe and bequeath, my houſe, wherein I now dwell, with the "garden and premiſes, to my brother *Edward Leach*, in truſt "for all my nephews and nieces, which ſhall be then alive, to be "equally divided among them, ſhare and ſhare alike. Likewiſe "I give, deviſe, and bequeath, unto all my nephews and nieces, "which ſhall be then alive, after the deceaſe of my ſaid wife, the "ſum of fifty pounds a-piece out of the ſecurities I now have by "me: the profits of it to the uſe of my wife for her natural life "without any abatement or deduction; ſhe repairing and keeping "in ſufficient the ſaid dwelling-houſe and premiſes during her "natural life and her executors and adminiſtrators ſo holding it "up to *Edward Leach* his executors or adminiſtrators at her de"ceaſe for the uſes before mentioned and likewiſe to pay the ſaid "legacies to *Edward Leach* or his executors or adminiſtrators in "in truſt for my then living nephews and nieces ſhare and ſhare "alike. Laſtly I make and ordain *Ann Leach* my loving wife "executrix of this my laſt will and teſtament ſhe paying what "debts and funeral expences may be incurred at the time of my "death."

The teſtator died upon the 24th of *March* 1791, leaving his wife, his brother *Edward*, and ſeveral nephews and nieces, the children of his deceaſed ſiſters, ſurviving him. His widow proved the will; and ſhe died in *May* 1791.

The bill was filed by *Edward Leach*, and the nephews and nieces of the teſtator, the children of his deceaſed ſiſters, againſt the executrix of the widow; praying the uſual accounts and a diſtribution of the reſidue as a reſulting truſt for the next of kin.

By the decree made upon the 21ſt of *November* 1794 at the Rolls directions were given for taking the accounts; and that the Maſter ſhould inquire and ſtate to the Court, of what the clear reſidue of the teſtator's perſonal eſtate conſiſted at the time of his death; and of what it then conſiſted; and that the Maſter ſhould inquire and ſtate to the Court, who were the next of kin of the teſtator living at the time of his death; and if any of them are ſince dead, who are their perſonal repreſentatives.

The plaintiff *Edward Leach* died after the decree. The ſuit was revived by his children; who were his executors.

The Maſter's Report by ſome miſtake ſtated, that *Edward Leach*, the teſtator's brother, was his ſole next of kin at the time of his death. The Report alſo ſet forth the accounts; and it appeared, that the perſonal eſtate not ſpecificially bequeathed conſiſted of a balance of 1298 *l.* due from the defendants 2750*l.* 4 *per cent.* Bank Annuities, part of 3800 *l.* 4 *per cents.* ſtanding in the teſtator's name at his death; the remainder of which had been ſold out by his widow and the defendants: 140 *l.* remaining due to the teſtator upon a mortgage from *John King*, and 20 *l.* remaining due to him upon bond.

Mr. Lloyd and Mr. Stanley for the plaintiffs referred to *Martin* v. *Rebow* (*a*) and the other caſes, that had been cited upon the former hearing (*b*), and the general rule, that a bequeſt to an exe-

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(*a*) 1 *Bro. C. C.* 154.

(*b*) It was ſaid, the point had been then determined; and ſo it appears by the note 4 *Bro. C. C.* 326, *Leach* (by miſtake called *Zouch*) v. *Lambert*: but the Maſter of the Rolls ſaid, the point was left open.

cutor makes him a truſtee for the next of kin as to the reſidue undiſpoſed of (a).

Mr. Graham and Mr. Martin for the defendants—The firſt impreſſion of the Court was certainly againſt the defendants: and I admit, the gift of the reſidue to the widow for life does afford a ſtrong argument, that ſhe is not to take any other intereſt. But ſee, how it ſtands upon the whole will, and how the reſidue is conſtituted. He has put all his houſehold goods, ſtock in trade, caſh, ſecurities for caſh, *&c*, together, and has forgot to ſay any thing about them after the death of his wife. Theſe things, which he had limited to her for life, had fallen out of his mind. If he meant to give her nothing more, he would have gone on to diſpoſe of the reſidue. The concluding ſentence, appointing her executrix, ſhe paying his debts and funeral expences, is convincing. What is the meaning of that, if he intended her to be only a truſtee? It would have been enough to have appointed her executrix; and paying his debts, *&c*, would have been of courſe. He intended her to be his perſonal repreſentative; to give her the beneficial intereſt upon thoſe terms. Why are we not to underſtand him to mean, as the law underſtands him, that the executrix ſhall take beneficially, unleſs there is ſomething to ſhew the contrary. In *Lawſon* v. *Lawſon*, which is ſtated in *Nourſe* v. *Finch* (b), Lord *Manſfield* admitted the general doctrine; but ſaid, there was nothing incompatible with ſuppoſing, he meant a general diſpoſition of his property. This turns upon the concluding part, the manner, in which he has made her executrix, not by very common words. It is clear, he was not appriſed of the obligation the law would caſt upon her; and he intended to give her ſomething more than a mere life intereſt; throwing upon her in the manner of appointing her executrix a duty incompatible with ſuch an intereſt.

Maſter of the Rolls—May it not be contended, that it is a gift to her for life; then the legacies to be paid; then making her executrix, ſo as not to charge the legacies till after her death?

(a) See the caſes collected and digeſted in Mr. *Cox's* note to *Farrington* v. *Knightly*, 1 *P. Wms.* 550. *Nourſe* v. *Finch*, and *Hornſby* v. *Finch*, 4 *Bro. C. C.* 239; *ante*, vol. 1. 344. vol. 2. 78. *Clennell* v. *Lewthwaite* and *Thornton* v. *Tracy*, *ante*, vol. 2. 465. 644. *White* v. *Evans*, *Holford* v. *Wood*, and *De Mazar* v. *Pybus*, *ante* 21. 76. 644.

(b) *Ante*, vol. 1. 344.

At present I think, there is great reason to contend that. Will not that account for the gift to her for life, and make it not inconsistent for her to take the residue, so as that her estate for life shall not be disturbed? It seems to me to be the residue: household goods, stock in trade, cash, and securities for cash, book debts, and so forth; I think it is the whole personal estate. He gives those legacies out of that residue, so as not to disturb her life interest. It is very clear, if he had only given her the residue for life, she could not have it absolutely: but in the way, in which he has disposed, is it not consistent with the intention to give her the whole for life, then providing for the legacies, and then giving her the residue as executrix? It is surprising, that no parol evidence has been produced in this case.

Mr. Lloyd in reply—There is no necessity for the construction suggested; and the Court will not, unless a manifest intention appears, add to these cases. It is wonderful, upon what ground the Court ever admitted parol evidence. The common conclusion of a will, appointing her executrix, clearly would not do, upon *Farrington* v. *Knightly* (a), and other cases. The office of an executor is to pay debts and funeral expences in the first place. There is nothing in the words, that are added. The former words are plain, that she shall have the bulk of the property for life only. It would be extraordinary, that all that property, given to her for life only, should become her's absolutely the moment the testator was dead, except as to those legacies. To entitle her there must be, as Lord *Thurlow* says, irresistible (b) proof, or she will be only a trustee. If he intended to give her the residue, why did he not give it, instead of marking the words strongly with the office of executrix? The safest construction is to abide by the general rule upon these cases, that as she takes the residue for life, she cannot take the whole beneficially. By the contrary construction the Court must strike out the words "*for life.*"

July 8.

Master of the Rolls—As to the mistake in this Report, I shall now consider it clear, that there were other persons, who were the next of kin of the testator at the time of his death, besides his brother *Edward*.

(a) 1 *P. Wms.* 550.

(b) This expression attributed to Lord *Thurlow* in *Bowker* v. *Hunter*, is too strong. See the rule correctly stated by the Master of the Rolls, *ante*, vol. 2. 471.

It is ſuppoſed by the printed note (a) upon this will, that I had decided the point; which I certainly did not: at leaſt the decree, which I have looked at, leaves the point perfectly open; and, ſo far from deciding it, there is a direction to take an account of what the perſonal eſtate conſiſted, and who were the next of kin of the teſtator. It is not likely, that behind their backs I ſhould have decided this point. But whether that opinion was thrown out by me, or not, it is perfectly open to reconſider it. I have reconſidered it; and it is not ſo clear by any means, as it ſeems to be taken by the next of kin: but upon full conſideration I am of the ſame opinion, which it is ſuppoſed I gave upon the former occaſion; that under the circumſtances of this caſe the bequeſt to the widow is a bar of her intereſt as executrix in the reſidue.

Executor takes the reſidue undiſpoſed of, unleſs there is a ſtrong and violent preſumption againſt him. A legacy does afford that preſumption, unleſs there are ſpecial circumſtances.

It is now ſo perfectly ſettled, that it is unneceſſary to repeat the rule, that making an executor does veſt in him the perſonal eſtate of the teſtator, unleſs a reaſonable ground appears upon the will, or, as I ſee I ſtated (b) in *Clennell* v. *Lewthwaite*, a ſtrong and violent preſumption, that the teſtator did not intend by making that executor to veſt in him the reſidue. It was long ago decided, that a legacy of any part of the perſonal eſtate, unleſs there are ſpecial circumſtances, does afford that preſumption, ſufficient to bar that general right as executor. The queſtion therefore is, when any thing is given to the executor, whether it is under ſuch circumſtances as to take away the preſumption, ariſing from part being given to him, that the whole was not intended to go to him as executor. This will bears upon the face of it many doubts. It is by no means ſo clear as it has been underſtood to be at the former hearing and upon this argument; but upon full conſideration of this caſe with all the other caſes I am of opinion, that I cannot without violating the rules, that have been laid down, wiſely or unwiſely, hold, that this teſtator's widow was entitled to the reſidue as executrix. The firſt words of the will ſeem to relate to real eſtate. There are words of inheritance. Upon the diſpoſition, which follows, in favour of the wife a doubt might have ariſen, whether that was a gift of all the reſidue, or not. If it did include the whole reſidue, it would fall within the rule, which, it is ſaid, upon the former occaſion I laid down; *viz.* that if the reſidue is given to the executrix for life, ſhe cannot take it abſolutely. But when one comes

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(a) 4 *Bro. C. C.* 326.

(b) *Ante*, vol. 2. 471.

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Dicks v. Lambert.

to ſee, of what the eſtate conſiſted at the teſtator's death, it is impoſſible not to hold, that this diſpoſition did include everything, that could poſſibly be given as reſidue. He has uſed extraordinary words. One does not know how to apply the word "*ſecurities*," whether it includes the ſtock. If he had perſonal ſecurities, or real ſecurities, that would be the more natural meaning. He gives the whole reſidue under certain words to his wife for life; and then after the death of his wife he diſpoſes of one part of it, and likewiſe gives certain legacies: which he charges upon a ſpecific part of it. It therefore becomes a little material to ſee, what he could mean by the gift of 50*l.* a piece to the nephews and nieces. By the Maſter's Report it appears, the teſtator had in 4 *per cent.* Bank Annuities 3800*l.* the ſum of 140*l.* remaining due to him upon a mortgage from *John King*, and upon bond 20*l.*: ſo, if I do not include the ſtock under the word ſecurities, there is nothing for thoſe legacies. It is impoſſible he ſhould not by this charge have meant it to be upon the ſtock as well as theſe two ſmall ſecurities. I muſt therefore hold, that under the word "*ſecurities*" he has included ſtock as well as what we generally call ſecurities. Conſequently he had given all thoſe articles, houſehold goods, ſtock in trade, caſh, ſecurities, &c. to his wife for life: then after her death he gives a houſe as a ſpecific bequeſt in truſt for his nephews and nieces; and he likewiſe gives to his nephews and nieces 50*l.* a piece, not out of his general perſonal eſtate, but out of his ſecurities. I am therefore to underſtand, that he has given her this intereſt for life and alſo the abſolute intereſt, as it has been argued. That brings it within the rule, that has ſo long prevailed; and unleſs there are particular circumſtances, as there were in *Lawſon* v. *Lawſon* and the other caſes, the preſumption ariſes, that, a particular part being given, the whole cannot be intended to be given. I have had more doubt than I thought I ſhould: but upon looking accurately into the will I am of opinion, there is a ſufficient preſumption, not rebutted by any evidence upon the part of the executrix, which I am ſurpriſed at, if the teſtator intended to give her the whole.

Ground of admitting parol evidence between the executor and next of kin as to the reſidue undiſpoſed of.

It is too late now to diſpute, that parol evidence may be admitted; and the Lord Chancellor in *Clennell* v. *Lewthwaite* tells (*a*) us the ground of it; that the Court thought, they had gone too far by the deciſions againſt the executor, and therefore allowed him to get rid of it by parol evidence. This executrix has not been able to

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(*a*) *Ante*, vol. 2. 649.

produce any evidence. Therefore upon the true conſtruction of this will it is a gift to her of the perſonal eſtate for life, with a charge only upon part of that perſonal eſtate of certain given legacies; and conſequently ſhe is barred. I deſire to be underſtood, that if this had been a bequeſt of the reſidue of the whole eſtate to her for life, and a charge of the legacies only after her death, there would have been nothing, upon which ſhe might not have contended, that ſhe was entitled to have the whole as well as that intereſt for life. But without overturning that rule, that a gift of part to an executor bars him from the whole, a rule, that has ſo long prevailed, whether wiſely or unwiſely eſtabliſhed, I cannot hold this executrix entitled; for that would be the effect upon this will. I am therefore of opinion upon this will, that ſhe cannot as executrix take this reſidue, part of which is given to her for life only.

Bequeſt to executor by way of exception is not ſufficient to bar him from the reſidue undiſpoſed of.

I deſire not to be underſtood to infringe upon any opinion the Houſe of Lords may be ſuppoſed to have given in *Lawſon* v. *Lawſon* upon the particular circumſtances of that caſe; and upon *Lady Granville* v. *The Dutcheſs of Beaufort* (*a*), which was much diſcuſſed in *Clennell* v. *Lewthwaite* (*b*) I am of opinion, that, if there was no ſuch parol evidence, upon which I ſee I ſuppoſed (*c*) the Houſe of Lords to have decided, that caſe did not afford a ſufficient preſumption to bar the executrix; for it was only giving a legacy with an exception out of it. If this could have been brought within that rule, as has been contended for the defendant, there would have been a ſtrong ground to ſay, it was to ſecure to her that intereſt for life, not charged with the legacies, which are afterwards given. When I firſt read this will, I thought, the nephews and nieces were the only next of kin. That would have afforded a ſtrong preſumption, that the teſtator intended them to have only the legacies; but only a preſumption. I deſire to be underſtood to decide upon this; that part of the reſidue is given to the executrix for life only; and that raiſes the preſumption, according to the doctrine, that has ſo long prevailed, that the teſtator did not intend to give her the whole. That is the ground, upon which I determine. I give this opinion not without ſome doubt upon it. It is not ſo clear a caſe as it is ſuppoſed.

(*a*) 1 *P. Will.* 114. 2 *Vern.* 648. 1 *Bro. P. C.* 305.

(*b*) *Ante*, vol. 2. 465; 644.

(*c*) *Ante*, vol. 2. 472.

Declare, that the perſonal eſtate of the teſtator not ſpecifically bequeathed was after the death of his widow diviſible according to the *Statute of Diſtributions*, and belongs one moiety to the executors of his widow, the other to his next of kin.

SHANLEY *v.* BAKER.

Rolls.
July 8.

Teſtator gave certain leaſehold houſes in truſt for *A.* abſolutely for her ſeparate uſe, and other leaſehold houſes in truſt for *B.* for her ſeparate uſe, for her life; and after her deceaſe for her children; if none, to fall into the reſidue; and he gave the reſidue in truſt for *A.* and *B.* to be divided between them ſhare and ſhare alike, and to be paid and applied in like manner for their uſe and benefit as the rents and profits of the leaſehold premiſes hereinbefore ſettled upon them; and their receipts to be a ſufficient diſcharge. The reference in the reſiduary clauſe is, not to the intereſts of *A.* and *B.* in the houſes, but to the proviſion, that they ſhall take for their ſeparate uſe; therefore they take the reſidue abſolutely.

A leaſehold houſe, the bequeſt of which, being to a Charity, fails, paſſes under a general diſpoſition of the reſidue, and does not belong to the next of kin as undiſpoſed of.

RICHARD ROWTON by his will gave to *William Hallet Baker* and *William Ireland*, and the ſurvivor of them, and the executors and adminiſtrators of ſuch ſurvivor, his leaſehold dwelling houſe No. 24 in *Lamb's Conduit Street*, and all the furniture upon the premiſes, and all his four leaſehold dwelling-houſes, No. 65 66 67 and 68 in *Holborn*; to hold the ſaid premiſes with the appurtenances for the remainder of the terms therein to come, upon the following truſts: *viz.* as to his houſes in *Lamb's Conduit Street* and No. 65 in *Holborn*, upon truſt to receive the rents, and apply the ſame, or ſo much as they ſhould think proper, for the maintenance and education of his grand-daughter *Sarah Franks Smith*, until ſhe ſhould have attained the age of twenty-one years; and upon that event happening upon truſt to permit and ſuffer her to receive the rents of the ſaid two leaſehold houſes during the reſpective terms, which ſhould be then therein, together with the houſehold furniture and fixtures in the ſaid dwelling-houſe No. 24, with liberty to reſide in the ſaid houſe, if ſhe ſhould think proper ſo to do, and for her own ſole and ſeparate uſe, benefit and diſpoſal; and the ſame were not to be ſubject to the debts, control, or engagements, of any huſband ſhe might marry: but her receipt alone notwithſtanding her coverture ſhould be a good and ſufficient diſcharge to his truſtees for ſo much money as ſhould be expreſſed in ſuch receipt or receipts reſpectively. And as concerning his three houſes No. 66, 67, and 68, upon truſt to receive the rents thereof during the reſpective terms therein, and to pay the ſame unto *Sarah Shanley* for her own ſole and ſeparate uſe and benefit for her natural life; with a ſimilar direction, that her receipt alone notwithſtanding coverture ſhould be a ſufficient diſcharge to the truſtees; and that the ſame ſhould not be ſubject to the debts, control, or engagements, of her preſent or any future huſband;

and after her deceaſe upon truſt to pay and apply the rents of the ſaid three houſes towards the ſupport, maintenance, and education, of all and every the child and children of *Sarah Shanley* equally between them, until they ſhould reſpectively attain the age of twenty-one; and upon that event happening then to be equally divided between them ſhare and ſhare alike; and if there ſhould be but one ſuch child, then the whole to be paid to ſuch child, his or her executors or adminiſtrators; and in caſe there ſhould be no ſuch child or children, who ſhould live to attain the age of twenty-one years, then he directed the rents of the ſaid three houſes to ſink into and be deemed part of his reſiduary eſtate.

The teſtator then gave his leaſehold dwelling-houſe No. 2 in *New Ormond Street* to *John Oldham*, or the treaſurer for the time being of a Society for Supporting and Perpetuating the Counteſs of *Huntingdon's* College, formerly in *Wales*, but then removed to *Cheſhunt*, *Herts*, to hold the ſame for the remainder of his term therein in truſt to apply the ſum of 5 *l.* yearly, part of the rents thereof, for the ſupport of the School at *Northampton* Chapel in the pariſh of *St. James*, *Clerkenwell*; and as to the reſidue of the rents, to apply the ſame to the ſupport of the ſaid College; and he directed his executors, if it ſhould be deemed expedient and neceſſary, abſolutely to aſſign all his eſtate and intereſt in that houſe to *Oldham* or the treaſurer for the time being upon the truſt and towards the ſupport of the ſaid ſchool and College. Then after ſeveral ſpecific and pecuniary legacies the teſtator made the following diſpoſition of the reſidue:

"And as to all the reſt and reſidue of my eſtate and effects whatſoever and whereſoever and of what nature or kind ſoever not by me hereinbefore particularly diſpoſed of, I give and bequeath the ſame unto my ſaid truſtees and executors and the ſurvivor of them, his executors and adminiſtrators, upon this further ſpecial truſt and confidence: that is to ſay, to and for the uſe of my ſaid grand-daughter *Sarah Franks Smith* and my daughter *Sarah Shanley*, to be divided between them ſhare and ſhare alike, and to be paid and applied in like manner for their uſe and benefit, as I have directed the rents and profits of my leaſehold premiſes hereinbefore ſettled upon them; and my will is, that their receipts for ſuch their reſpective moieties of ſuch

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"reſidue ſhall be ſufficient diſcharges for the ſame to my ſaid truſ-"tees and executors or the ſurvivor of them."

The teſtator appointed his truſtees to be his executors and guardians of his grand-daughter.

The bill was filed upon the death of the teſtator by *Thomas Shanley* and his wife, and *Sarah Franks Smith*, who had attained the age of twenty-one; praying, that the bequeſt of the houſe in *Ormond Street* to *Oldham* may be declared void; and that the houſe may be ſold, and the money be declared to form part of the general reſidue of the teſtator's perſonal eſtate; that the uſual accounts may be taken: and that the plaintiffs may be declared to be abſolutely entitled to the reſidue in equal moieties.

The queſtions were firſt, whether the plaintiffs were entitled under this will to an abſolute intereſt, or to an intereſt for life only, in the reſidue.

Secondly, whether, the bequeſt of the houſe to charitable purpoſes being void, that ſhould fall into the reſidue, or ſhould be conſidered as undiſpoſed of.

Mr. Grant and Mr. Pemberton for the plaintiffs contended, that they took an abſolute intereſt in the reſidue.

Mr. Lloyd for the truſtees—That conſtruction is impoſſible as to the plaintiff *Shanley*. The firſt bequeſt is abſolute, no doubt. The will is inaccurate; becauſe it was intended, that there ſhould be an eſtate remaining in the truſtees, to receive the rents, and pay them to the ſeparate uſe of the plaintiffs. What conſtruction can there be upon the words "in like manner" and "ſettled upon "them," unleſs they are applied to the three houſes given to *Sarah Shanley* and her children? The teſtator knew how to give an abſolute intereſt: therefore he meant ſomething beyond that by this expreſſion. It is difficult to find out what he meant: but he did not intend to give to *Sarah Shanley* an abſolute intereſt.

Mr. Short for the next of kin claimed as undiſpoſed of, the leaſehold houſe, the bequeſt of which in favour of the Charities failed.

Maſter of the Rolls—The expreſſion "in the ſame manner" only means for their ſeparate uſe, not, for the ſame intereſt. It is impoſſible to apply it ſo. But there is a fair way of applying it; *viz.* to the direction, that theſe leaſehold eſtates ſhall be to the ſeparate uſe of the plaintiffs; for though they are given in a different manner, they are both given in that way. How can they take the ſame eſtate in the reſidue as it is ſaid the plaintiff *Shanley* takes in the leaſehold houſes, when the teſtator directs the rents of the leaſehold houſes to ſink into the reſidue, in caſe there ſhall be no child or children, who ſhall live to attain the age of twenty-one. I am to ſuppoſe, the gift of the reſidue is to ſettle it again upon them. How can that poſſibly be? By the words "in like manner, *&c.*" he means for their ſeparate uſe. I ſhall conſtrue it ſo.

As to the point made for the next of kin, it has been determined, that this intereſt falls into the reſidue as not diſpoſed of (*a*).

Declare, that the bequeſt of the leaſehold houſe to the Charity is void by the *Statute* (*b*); and that it became part of the reſidue; and, that the reſidue of the teſtator's eſtate not ſpecifically bequeathed belongs to the plaintiffs in equal moieties as tenants in common, to their ſole and ſeparate uſe. Declare, that the plaintiff *Smith* is entitled to the houſes No. 24 *Lamb's Conduit Street* and No. 65 *Holborn* abſolutely; and that the rents of the houſes No. 66, 67, and 68, *Holborn* are payable to *Sarah Shanley* for life, for her ſeparate uſe, with liberty to her children to apply after her death.

(*a*) *Brown* v. *Higgs*, ante, 708. *Kennell* v. *Abbot*, poſt. (*b*) 9 *Geo.* 2. *c.* 36.

SIMMONDS *v.* LORD KINNAIRD.

June 5th.
July 9th.

Bill ſtating a ſequeſtration for want of an anſwer prayed a diſcovery and account of all money or other property of the defendant in the original cauſe in the hands of defendants, who were bankers, at the time of ſervice of the ſequeſtration, or ſince. Upon demurrer as to the money and anſwer as to the reſt of the bill the Lord Chancellor determined againſt the demurrer upon the form, conſidering it overruled by the anſwer; and would not in that ſtage of the cauſe decide the two points: 1ſt, whether a ſequeſtration on meſne proceſs can be executed farther than to pay the expences: 2dly, whether a *choſe in action* is liable to ſequeſtration.

THE bill, filed in *May* 1795, by perſons claiming as creditors of the late Duke of *Cumberland*, on behalf of themſelves and all the other creditors, ſtated, that the plaintiffs *Simmonds* and *Praed* in *Hilary Term* 1793 filed a bill againſt her Royal Highneſs the Ducheſs of *Cumberland* and others; to which all the defendants appeared, and all except the Ducheſs put in their anſwers; and in order to oblige her Royal Highneſs to put in her anſwer the plaintiffs proceeded to take out proceſs of contempt; ſo that a Commiſſion of ſequeſtration on or about the 15th of *July* laſt iſſued againſt her, to ſequeſter her perſonal eſtate and the rents and profits of her real eſtates, until ſhe ſhould anſwer the bill; but ſhe has not yet anſwered the bill; and the ſaid proceſs of ſequeſtration has, ever ſince the ſame iſſued, been, and now is, in force againſt her. At the time the Commiſſion of ſequeſtration iſſued, and when the notice after-mentioned was given, and afterwards from time to time, conſiderable ſums of money and other property belonging to the Ducheſs of *Cumberland* were in the hands of the defendants; who are bankers; and in order to reſtrain them from paying the ſaid money to the Ducheſs a notice of the ſaid Commiſſion of ſequeſtration together with a copy of ſuch Commiſſion was on or about the 23d of *October* laſt ſerved upon one of the defendants' clerks.

The notice, which was ſigned by two of the Commiſſioners, reciting a Commiſſion to ſequeſter all the real and perſonal eſtates of the defendant, the Ducheſs of *Cumberland*, until ſhe ſhall fully anſwer the bill, proceeded thus: "And we being informed, that "the ſaid Ducheſs of *Cumberland* hath ſeveral ſums of money, "goods, chattels, and perſonal eſtate, in your hands, cuſtody, or "power, or in the hands, cuſtody or power, of ſome or one of "you:" it then gave notice to the defendants not to pay to the Ducheſs or to any perſon or perſons for her uſe "any ſum or "ſums of money now in your hands, or which ſhall or may come "to your hands, of or belonging to, or for, or on account of, "the defendant *Ann* Ducheſs of *Cumberland;* and that you are "not to part with any goods, chattels, or other perſonal eſtate, "whatſoever in your or either of your cuſtody or power, belonging to the ſaid defendant," &c. This notice was dated the 23d of *October* 1794.

The bill charged, that notwithſtanding ſuch notice the defendants paid or delivered the whole of the money and other property, which were at the time of their being ſerved with ſuch notice in their hands, belonging to the Ducheſs of *Cumberland*, to her, or to ſome perſon or perſons for her uſe, or on her account; and that they have alſo from time to time ſince ſuch notice was ſerved, as aforeſaid, paid to her or on her account divers ſums of money and other property in their hands and belonging to her; and they have now in their hands ſome money or other property of her's, which they refuſe to diſcover; and that they ought to diſcover all and ſingular the ſums of money and other property of the Ducheſs of *Cumberland*, which they have had in their hands or ſhop, ſince they were ſerved with the ſaid notice: but they refuſe to diſcover the ſame.

The bill prayed a diſcovery of the facts ſtated, and an account of all and every the ſums or ſum of money or other property (if any) of the Ducheſs of *Cumberland*, which the defendants had in their hands or ſhop at the time, when ſuch notice was ſerved, as aforeſaid, and have had in their hands or ſhop from time to time ſince, and have now in their hands or ſhop.

The defendants to ſo much of the bill as ſeeks a diſcovery, whether ſome conſiderable, or ſome and what, ſums or ſum of money belonging to *Ann*, Ducheſs of *Cumberland* were or was not in the hands of the defendants, as her bankers, at the time the notice of the Commiſſion of ſequeſtration in the bill ſet forth was ſerved upon the defendants, and have not, or has not, been in their hands at divers or any times or time ſince the ſaid notice was ſo ſerved, and now are or is in their hands or ſhop, and alſo, whether the defendants, or ſome or one of them, have not notwithſtanding ſuch notice paid the whole or ſome part of the money in their hands at the time of ſuch notice being ſerved, and ſince, which belonged to the Ducheſs of *Cumberland*, to her, or to ſome perſon or perſons for her uſe or on her account, demurred for want of Equity.

And for anſwer to ſo much of the bill as they have not before demurred to, or as they are adviſed is material or neceſſary to anſwer to, they anſwer, and ſay, and firſt, to ſo much of the ſaid bill as ſeeks a diſcovery of what goods and chattles or other perſonal eſtate except money belonging to the Ducheſs of *Cumberland* theſe defendants have had in their hands, they deny, that they have or ever had any ſuch goods or chattels or other perſonal eſtate at any time, either at the time or ſince the ſervice of the ſaid notice of ſequeſtration. And they ſay, it may be true for any thing they know, but they cannot of their own knowledge ſet forth, whether the plaintiffs did file ſuch bill, &c, as in the bill is mentioned; nor whether the defendants did appear, and all except the ſaid Ducheſs put in their anſwers; nor whether ſhe has yet anſwered; nor whether the Commiſſion of ſequeſtration did iſſue, &c, as in the bill is mentioned; and they admitted the ſervice of the notice.

When this demurrer was argued, the Lord Chancellor directed it to ſtand for further argument; and his Lordſhip threw out the following obſervations:

This is a point of very great importance; and I ſhould wiſh to conſider it a little more at leiſure. It may juſt as well be argued upon the demurrer. It ſtruck me as a ſingularity; for it immediately occurred, that if this proceſs could be extended to all the debts due to a perſon only brought in to anſwer, it would go a great deal farther than any proceſs at law. With reſpect to all privileged perſons the only way of bringing them to anſwer at Common Law is by diſtreſs. The party can do nothing at law but by proceſs of outlawry. That is by force of the prerogative. I wiſh to inquire into it. It is not familiar; and no precedent has been cited but one from *Tothill.* I do not feel any objection to extending the proceſs, if the Court has done it. It is impoſſible to carry it farther than it has been carried. Outlawry is a vaſtly common proceſs. At this day it is the common proceſs in *Ireland* (*a*). Mr. *Dickins* has mentioned to me a caſe before Lord *Thurlow*, in which the ſequeſtrations upon real eſtate applied, that the tenants might attorn and pay the rents, and Lord *Thurlow* refuſed it.

Outlawry is at this day the common proceſs in *Ireland*.

July 9.

The Solicitor General in ſupport of the bill—In *Rowley* v. *Ridley*, the cauſe before Lord *Thurlow*, to which your Lorſhip has been referred, the ſequeſtration was for want of an anſwer. It is ſaid, ſuch a ſequeſtration is not to be executed, but is merely to ground an application to have the bill taken *pro confeſſo*. Every day's practice is againſt that. The real difference between a ſequeſtration upon meſne proceſs for want of an anſwer and a ſequeſtration

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(*a*) The proceſs by *Cuſtodiam* upon outlawry forms a conſiderable branch of the civil adminiſtration of juſtice in *Ireland*. Upon an application to the Court of Exchequer by motion after the inquiſition on the *Capias utiagatum* the lands of the defendant are granted by that Court to the plaintiff by *Cuſtodiam*, in the nature of a leaſe, reſerving a ſmall rent to the Crown. See 4 *Inſt.* 111. *Vernon and Scriven's Reports* title *Cuſtodiam*. *Conroy's Treatiſe upon Cuſtodiam*, and Reports of caſes upon that ſubject. This proceſs is noticed by Lord *Hardwicke*, 2 *Atk.* 23. 408.

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for payment of a ſum of money to ſatisfy a decree is, that upon the former the Court does not ordinarily diſpoſe of the property; but keeps it, uſing it as a diſtreſs; the object being merely to compel the party to appear and comply with the forms of the Court to enable it to make a decree. In *Harriſon's Chancery Practice* (a) this is laid down correctly as to the power of ſequeſtrators. The ground, upon which Lord *Thurlow* refuſed the order in *Rowley* v. *Ridley*, has been miſtaken. The point, whether a ſequeſtration for meſne proceſs is to be executed, was fully diſcuſſed upon that occaſion; and it was ſo determined after a full hearing. The bill was filed in *Trinity* Term 1781 among other purpoſes, to prevent ſpoil upon the eſtate, of which the defendant *Ridley* was tenant for life in right of his wife, and the plaintiff remainder-man; for an account of timber cut, and of the perſonal eſtate of the plaintiff's father received by the defendant and his wife. It was very important to have the anſwer of the defendant. No effectual decree could be made without it. It was not like a caſe, where the object is to have the bill taken *pro confeſſo*. In *Michaelmas* Term the defendant obtained time to anſwer. Proceſs iſſued at length to a ſequeſtration. Upon the 18th of *November* 1783 a motion was made, that the tenants ſhould attorn to the ſequeſtrators. The objection now made, that the ſequeſtration iſſued as meſne proceſs only, and before a decree, was diſcuſſed before Lord *Thurlow*; who was of opinion the order ſhould not be then made, for this reaſon; that the ſequeſtrators had not returned the names of the tenants. His Lordſhip thought, they ought to have returned the names; and that the tenants had refuſed to attorn. That return was obtained. Lord *Thurlow* in the interval reſigned. The queſtion then came upon the return before the Lords Commiſſioners. It was then diſcuſſed with great inveſtigation by the Regiſters, and by thoſe, who were employed for the plaintiff. The defendant had gone abroad. All his property had been conveyed to perſons ſuppoſed to have fraudulent intereſts. After great diſcuſſion upon the 26th of *January* 1784 it was ordered, that the tenants *nominatim* ſhould attorn to the ſequeſtrators. *Edward Ridley* the younger claiming part as a purchaſer, an order was made upon the 20th of *April* 1784 upon his application and that of *Edward Ridley* the elder, and others, as tenants to *Ridley* the younger, that they ſhould be examined *pro*

(a) Vol. 1. 327, &c.

intereſſe ſuo. Another order of the ſame kind was made upon the part of *Brown*, a mortgagee. His right was clear: but as to the claim of *Ridley* the younger there were ſtrong circumſtances to ſhew, that it was a mere contrivance to avoid the ſequeſtration. Examinations were put in after great delay; and by an order made on the 24th of *May* 1787 it was referred to the Maſter to look into the examinations of *Edward Ridley* the younger and the tenants and the depoſitions of the witneſſes; and, in caſe any material circumſtances ſhould ariſe, with liberty to ſtate them; and farther directions were reſerved. The Maſter's report was made upon the 31ſt of *July* 1789. That was excepted to; and upon the exceptions an order was made upon the 13th of *July* 1790, that the Maſter ſhould review his Report. It was then compromiſed. But the ſimple queſtion was, whether the conveyance to avoid the ſequeſtration was fraudulent, or not; and the ſequeſtration was one, that was completely executed; and the ſuppoſition, that upon this caſe a ſequeſtration for meſne proceſs is not to be executed, is erroneous; and ariſes from confounding the motion before Lord *Thurlow*, when upon the ground I have ſtated an order for the attornment was refuſed, with the ſubſequent proceedings. The order for the tenants to attorn was made by the Lords Commiſſioners: all the others were by Lord *Thurlow*.

Mohun v. *Lord Mohun* (*a*), an extract of which caſe from the Regiſter's book was laid before Lord Commiſſioner *Aſhhurſt*, clearly proves, that a ſequeſtration for not appearing may be executed; alſo that Lord *Thurlow* was correct in requiring the order upon the tenants to attorn to be by name. *Deſborough* v. *Cromie* in the Court of *Exchequer* ſhews exactly the difference between a ſequeſtration upon meſne proceſs and a decree for payment of money. In *Davis* v. *Davis* (*b*) it is plain Lord *Hardwicke* had no conception, but that a ſequeſtration for want of an anſwer might be executed, and the defendant's goods or real eſtate ſeized: then the plaintiff may proceed to have the bill taken *pro confeſſo*; and then he may proceed, as is directed in *Maynard* v. *Pomfret* (*c*). It has been ſtated, that the order made in that caſe cannot be found. I have a copy of it, dated the 17th of *March* 1747. By that order it was referred to the Maſter to appoint a receiver of the freehold and leaſehold eſtates in queſtion; and it was ordered, that

(*a*) 2 *Ch. Ca.* 163. (*b*) 2 *Atk.* 21. (*c*) 3 *Atk.* 468.

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the tenants ſhould attorn, and that the ſequeſtrators ſhould deliver poſſeſſion to the receiver; and the defendant conſenting to a ſale of the houſehold goods and books, it was ordered, that they ſhould be ſold, and that the money ariſing from the ſale ſhould be paid to the receiver, ſubject to farther order.

Lord *Hardwicke* obſerved, that paying the coſts merely would not do juſtice; but that he would retain the proceſs for the purpoſe of enabling himſelf to execute the decree. What is there laid down is in direct conformity to the poſition in *Harriſon's Chancery Practice*, that the whole is in the diſcretion of the Court.

A Report was made in that cauſe, ſtating a balance againſt the defendant of about 1000*l.*, alſo what had been received by the receiver under the ſale. The amount of the produce of the ſale and of the rents, *&c*, amounted very nearly to the balance reported due from the defendant; and the final order was, that upon paying over to the plaintiff the ſum in their hands, and the defendant paying the difference, and the coſts, the receiver might be diſcharged. So the ſequeſtration was fully executed, and the juſtice of the caſe obtained. *Pomfret*'s examination would have been got in with as much difficulty as his anſwer, if the whole property had not been in the poſſeſſion of the Court. There is a ſhort note of the caſe by Mr. *Brown*, the King's Counſel; which agrees with the Report in *Atkyns*.

Wharam v. *Broughton* (*a*) is upon a different point: but Lord *Hardwicke* upon this ſubject incidentally obſerves (*b*), in conformity to what he had determined in 1747, that the Court now orders goods to be ſold under a ſequeſtration for a collateral contempt before a decree, as after a decree, in aid of its proceedings and for attaining juſtice. In *Hales* v. *Shaftoe* (*c*) it was not at all doubted, that a ſequeſtration iſſuing as meſne proceſs ſhould be executed. The only queſtion was, what ſhould be done upon it, when executed: whether there could be a ſale farther than to pay the expences of the ſequeſtration. The defendant in that cauſe was upon more than one occaſion treated by the Court with great tenderneſs. *Wilcocks* v. *Wilcocks* (*d*), before Sir *Thomas Clarke*, who was very accurately acquainted with the practice of the

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(*a*) 1 *Veſ.* 180.

(*b*) 1 *Veſ.* 184.

(*c*) *Ante*, vol. 1. 86.

(*d*) *Amb.* 421.

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the Court, and muſt have known Lord *Hardwicke*'s view in that deciſion in *Maynard* v. *Pomfret*, is in exact conformity to that caſe. Your Lordſhip alſo concurred with it in *Shaw* v. *Wright* (*a*). There is no doubt therefore, that a ſequeſtration for meſne proceſs to compel an anſwer may be executed directly, upon which a decree may be obtained; and there are many caſes, in which it is ſcarcely poſſible to obtain a decree but by anſwer; and ſtill if the bill is taken *pro confeſſo*, yet the ſequeſtration may be made uſe of to compel the defendant to account.

This bill is filed againſt the Ducheſs of *Cumberland*, accountable for the debts of the late Duke, ſtanding out all proceſs to ſequeſtration. It muſt be preſumed a balance is due; and therefore if the ſequeſtrators were in poſſeſſion of the property, your Lordſhip might order what was taken to be retained to anſwer the final balance.

The other difficulty is upon the foundation of the demand; whether there can be a ſequeſtration of a *choſe in action*. This is a point of great importance to the juriſdiction. If it can be maintained, that *choſes in action*, or rights in action, cannot be ſequeſtered, all thoſe perſons, againſt whom there can be no other proceſs, will be enabled to elude the juſtice of the Court. In *Lakes* v. *Meres*, 11 *James* (*b*), the Court entertained ſuch a bill as this, and made the order we now pray in aid of the ſequeſtration, and the Regiſter's book agrees with *Tothill*. All the books of practice ſtate, that the Court has ſequeſtered debts in other men's hands. The words of the writ are to ſequeſter "all his goods, "chattels, and perſonal eſtate." From *Hide* v. *Pettit* (*c*) it ſeems as if the latter words "and perſonal eſtate" had been added; and the form was, I preſume, altered in that caſe. In *Opie* v. *Maxwell*, before Lord *Macclesfield* 25th of *February* 1768, the ſequeſtration was for not paying money: but that makes no difference as to the power of the ſequeſtrators. Under a ſequeſtration for want of an anſwer they are equally to take the property, and obey the orders of the Court. The order in that cauſe was that the Commiſſioners of the Victualling and Ordnance offices ſhould pay the money in their hands belonging to the defendant to the ſequeſ-

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(*a*) *Ante*, vol. 3. 22.

(*b*) *Tot.* 175.

(*c*) 1 *Ch. Ca.* 91. affirmed in parliament. See 4 *Bac. Abr.* 425.

trators. That was a right of action. It was alſo determined in the ſame cauſe by an order, made on the 16th of *March* 1718: a perſon named *Tournay* being ſuſpected of having money of the defendant's in his hands, an order was obtained to examine him and the clerks of the Ordnance and Victualling offices as to what money was in their hands, belonging to the defendant. In *Barrington* v. *Hereford*, in 1775 before Lord *Bathurſt*, the Commiſſioners under a ſequeſtration returned a legacy given to the defendant; and it was ordered, that the executor ſhould pay the legacy into the Bank. It was not money due in the cauſe. A ſequeſtration is upon the ſame principle preeciſely as an outlawry. Except in the caſe of privileged perſons it iſſues only after a commiſſion of rebellion; after the perſon has been treated as a ſpecies of outlaw, as a rebel. Unleſs theſe proceedings can be had, the whole juſtice of the Court may be defeated by perſons, whoſe rank in life does not admit of proceſs againſt their perſons, but who may be in the receipt of large property.

This demurrer therefore ought to be overruled. The principle of it would juſt as much apply to the whole as to any part; and by anſwering to part and demurring only as to the money in their hands they have decided upon the principle.

Mr. Mansfield and Mr. Martin in ſupport of the demurrer—No inſtance has been ſtated of ſuch a bill againſt a perſon ſuppoſed to have property liable to be ſequeſtered, as goods, or that ſort of property not liable to ſequeſtration, as *choſes in action*, debts due to the defendant. Your Lordſhip will not make a new precedent, and make the proceſs of this Court, which may be inforced immediately by order, the ſource of a new ſuit. It certainly cannot be the law of this Court, that, to compel a perſon to appear or anſwer, debts due to the defendant may be taken hold of. *Maynard* v. *Pomfret* and *Wilcocks* v. *Wilcocks* were a great ſtretch of power; though certainly for the ends of juſtice. In the former of thoſe caſes it was admitted, the goods could not be ſold without conſent. This meſne proceſs is now to operate as an execution, to anſwer a demand in its nature unliquidated, and which it may take up years to inveſtigate. It has no analogy to any other inſtance in the law of this country.

The next difficulty is, how it is poſſible to take hold of debts or *choſes in action*. This point is reduced to two caſes, with all the induſtry, that has been uſed: firſt that from *Tothil:* ſecondly *Opie* v. *Maxwell.* The former is very ſhort; and it occurred at an early period, when the duty of ſequeſtrators was very ill underſtood. That is completely anſwered by the opinion of Lord *Nottingham* (*a*); who in his *Syſtem of the Practice of a Court of Equity* treating of Sequeſtration ſays, it is but in the nature of a continuing *Levari facias*; and that a perſon, who had obtained it againſt a man injuriouſly diſpoſſeſſed, could not ſue the wrongdoer; for a right of action cannot be ſequeſtered.

Lord *Nottingham* alſo in his *Prolegomena of Equity*, chapter 28 treating of Sequeſtrations, and anſwering objections to them, cites *Gibbons* v. *Buckworth*, *Trinity Term* 24 *Charles* 2; which is an authority, that a *choſe in action* cannot be ſequeſtered. A partner with *Thomas Handy*, maſter of a ſhip in a voyage to *Guinea*, ſued as adminiſtrator to ſequeſtration for want of an anſwer; and then ſued a merchant, who had poſſeſſed nineteen bars of gold, the property of *Handy*, and coined them. It was held, that the ſequeſtration was no title; for a mere right of action cannot be ſequeſtered. That point was directly before the Court.

In *Opie* v. *Maxwell* there was a decree for payment of money; and proceſs iſſued to ſequeſtration for not obeying the decree. Money was due to the defendant from the Commiſſioners of the Victualling and Ordnance offices; and upon the application of the ſequeſtrators it was ordered to be paid to them: but the Commiſſioners were willing to pay according to the order of the Court: no reſiſtance was made; and probably the defendant did not appear. The other part of the caſe was, that *Tournay*, an iron-merchant, being ſuſpected of having money of the defendants in his hands, upon the application of the ſequeſtrators an order was obtained to examine him and alſo the clerks of the Victualling and Ordnance Offices as to what money was in their hands. That was a hoſtile proceeding againſt *Tournay*, I admit: but that is the only caſe, in which ſuch a thing appears. Upon what principle

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(*a*) Theſe quotations were taken from Lord *Nottingham*'s MSS. in the poſſeſſion of Mr. *Hargrave*. See alſo *Brograve* v. *Watts*, *Cro. Eliz.* 651. 4 *Inſt.* 84. *Waller's Caſe*, *Mich.* 20. *James*. *Olwayt's Caſe*, 5 *Char.* *Bill* v. *Heber*, 22 & 23 *Char.* 2. Lords' Votes againſt ſequeſtrations. *Sir Thomas Reeves's Caſe*, in Lord *Coventry*'s time. See ſeveral other authorities referred to in *Hinde's Chan. Pract.* 127.

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ſuch a juriſdiction can be exerciſed, has not been ſtated. In no part of the law is ſuch an execution to be found. A man may have 100,000 *l.* in the funds; and his creditors cannot poſſibly touch it (*a*), being a debt from the Public: much leſs can they reach a debt from any other perſon. The form of the ſequeſtration expreſſes goods, chattels, and perſonal eſtate: but what is meant by that does not appear except in that ſingle caſe. In *Morrice* v. *The Bank of England* (*b*) Lord *Talbot* took into conſideration the difference as to executions between courts of law and courts of equity; and conſiders that of courts of equity as more effectual on account of the proceſs of ſequeſtration; and there Lord *Talbot*, when particularly contraſting the execution in this Court and at Law, and giving the preference to that in this Court, does not notice any power in the Court to lay hold of *choſes in action*, but confines it to goods. That is certainly the general underſtanding. When, and by what authority, could this Court eſtabliſh a proceſs to take *choſes in action?* What can be more abſurd than upon a proceſs, which is either to compel an appearance or an anſwer, which ſhould be enforced with as much expedition as poſſible, to take *choſes in action* under the denomination of perſonal eſtate? How are the ſequeſtrators to obey the writ? Can they bring an action? Perhaps the debtor may pay the money voluntarily: but if not, there is no way, by which the ſequeſtrators can get poſſeſſion; neither by action nor by bill. The proceſs according to the words of it cannot poſſibly apply to any ſpecies of perſonal eſtate, which the ſequeſtrators have no means to lay hold of. In caſe of a diſputed debt the proceſs is abſolutely ridiculous. Are the ſequeſtrators to come to this Court for an order to bring an action in the name of the creditor? A bill could not be filed; the proper remedy being by ſuit at law. It is difficult to conceive there ſhould not be numberleſs caſes, if the law was not underſtood to be otherwiſe. There is no inſtance but thoſe two; for *Barrington* v. *Hereford* turns out ultimately to be nothing. Lord *Bathurſt* did direct the defendant to pay to the ſequeſtrators a ſum of money, to be paid by them into the Bank, ſubject to the claims upon it, and ſubject to farther order; and no farther order appears. The fact is, Sir *James Hereford* was himſelf deſirous of paying the legacy, and did not oppoſe the order. There muſt have been many inſtances, if it was not underſtood, that from the nature of

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(*a*) See *Dundas* v. *Dutens*, *ante*, vol. 1. 196.

(*b*) *For.* 217. 4 *Bro. P. C.* 287.

the proceſs, and the analogy to proceſs againſt goods at law, ſequeſtrators can take only goods properly ſo called. This bill is contrary to Lord *Macclesfield*'s idea in *Opie* v. *Maxwell*; for it ſuppoſes, the ſequeſtrators may even get money, that might get into the banker's hands after ſervice of the Copy of the Sequeſtration: in that caſe it was only as to money in their hands at the time. Money paid into a banker's only gives a right of action. The ſpecific caſh or notes cannot be recovered.

Theſe plaintiffs are purchaſers of annuities from a gentleman, for whom the Duke of *Cumberland* was ſecurity. The Ducheſs has paid in diſcharging debts by ſimple contract as much as ſhe received from the aſſets: but this being by ſpecialty, ſhe could not ſucceed upon *plene adminiſtravit*. She ought therefore to be protected, if poſſible.

Solicitor General in reply—The plaintiffs purchaſed by auction the ſecurity, under which they claim. The fact as to *Barrington* v. *Hereford* is quite different from what is now ſtated; and the bills of coſts and the other papers in the cauſe prove it. The ſequeſtrators were apprehenſive, that Sir *James Hereford* would pay it over; and to prevent that the order was ſerved, and the petition ſet down out of courſe upon a ſpecial application. It is plain from the items in the bills of coſts, the proceedings were not amicable. In *Rowley* v. *Ridley* it appears by the Regiſter's book, that the tenants were ordered to attorn and pay the rents; and the rents in arrear were a *choſe in action*. In *Maynard* v. *Pomfret* it appears, that the whole balance was finally paid by the defendant in conſequence of the account being ſtated; and the goods in the hands of the ſequeſtrators had been delivered to a perſon upon his ſecuring the value.

Plaintiff pays the coſts upon a bill of diſcovery.

LORD CHANCELLOR—By this bill you pray nothing but a diſcovery. No ſpecific relief is prayed. Therefore you file the bill in this form, that of neceſſity you muſt pay them the coſts.

I am inclined at preſent to overrule the demurrer; for I am not quite ſo clear, what I may do afterwards, when the defendants have anſwered. I wiſh the proceſs could go the extent you deſire. When one conſiders the immenſe maſs of property, that may be poſſeſſed in this kingdom, anſwerable for nothing. Suppoſe, a great landed eſtate was converted into an annuity upon the conſolidated fund: no proceſs can reach it, unleſs this Court can get at it. On the other hand I am not aware of all the conſequences of either impounding the money in the hands of the bankers or making them pay the money. Why not againſt the bank?

The Solicitor General—There is in almoſt every Act of Parliament creating funds a proviſion, that they ſhall not be ſequeſtered.

Lord Chancellor—Then it will go to all chartered Companies.

I think, there is no harm in overruling the demurrer. Upon the technical rules, ſtrictly ſpeaking, I believe the anſwer overrules the demurrer. They have no more buſineſs to anſwer one queſtion than the other. They might have had bank-notes depoſited in their hands. They take upon themſelves to conſtrue, what are effects.

Demurrer overruled.

The *Solicitor General* added, that the orders upon tenants are univerſally to pay their arrears as well as the accruing rents; and referred to *Hamline* v. *Lee*, in *Chancery* before Lord *Hardwicke*, the 19th of *October* 1743, and *Fawcet* v. *Fothergill*, before Lord *Cowper*, cited in that caſe by the Solicitor General.

The Lord Chancellor obſerved, there is no execution at law againſt the land, that will likewiſe go to the arrears.

KIRBY *v.* POTTER.

Rolls.
July 10.

Legacy of “ 1000*l.* out “ of my Reduced Bank “ Annuities” held pecuniary: the Court leaning againſt holding a legacy ſpecific, unleſs clearly intended. The Court would not take into conſideration evidence of the value of the ſtock at the date of the codicil, by which the legacy was given, nor an eraſure of a legacy to the ſame perſon by the will; but decided upon the words of the codicil.

THE teſtator by his will, dated the 24th of *December* 1795, after giving directions as to his interment, deſiring, that the intereſt of 100*l.* of his Bank Annuities be applied from time to time to keep his monument in repair, and directing, that all the money given by him be paid within ſix months after his deceaſe, among ſeveral legacies, all pecuniary, gave to the poor of the pariſh of *Chelſea* 100*l.*, to be laid out in ſtock; and to Mrs. *Ann Kirbey*, who had lived many years as houſekeeper to him the ſum of fifty pounds for her integrity and care. The will then proceeds thus:

“ To whom I do alſo give and bequeath all my leaſehold eſtate conſiſting of four houſes,” ſituate at *Chelſea*, “ and to whom I moreover give and bequeath my annuities in two ſeparate orders of thirty pounds *per annum* payable out of his Majeſty’s receipt of Exchequer for and during the remainder term of my intereſt therein. I give and bequeath likewiſe to her ſon *Francis Kitching Kirbey* [the ſum of ſix hundred pounds and] my annuity being a ſeparate order N° 931 of ten pounds *per annum* payable alſo out of his Majeſty’s receipt of Exchequer for and during remainder term of my intereſt therein.”

By this will, which was duly executed according to the *Statute of Frauds*, a real eſtate was deviſed to the defendant; who was alſo appointed executor and reſiduary legatee. The words incloſed between brackets were eraſed: but no notice was taken of the eraſure in the atteſtation or otherwiſe.

The teſtator made the following codicil, dated the 26th of *April* 1798.

“ My intention and will by the codicil added hereto is to give to *Francis Kitching Kirbey* a legacy of one thouſand pounds out of my Reduced Bank Annuities 3 *per cents* by my executor within one month from my deceaſe for his integrity, ſobriety, and good behaviour, and deſerving perſon in every reſpect.”

The bill was filed by *Francis Kitching Kirby*, who was the ſon of *Ann Kirby*, claiming under the codicil 1000*l.* as a pecuniary legacy; and the only queſtion was, whether that legacy was pecuniary or ſpecific.

The teſtator had above 3000*l.* 3 *per cent.* Reduced Bank Annuities, beſides other Stock.

The plaintiff went into evidence, that at the date of the codicil the value of 1000*l.* Reduced Bank Annuities was no more than 470*l.* ſterling.

The Maſter of the Rolls deſired the Counſel for the plaintiff to go upon the words only; and added, that he could take no notice of what had been ſtruck out of the will.

Mr. Piggott for the plaintiff—The intention appears clearly to give 1000*l.* in money. The terms the teſtator has uſed, expreſſing high regard for this legatee, ſhew the object to be to increaſe rather than diminiſh his bounty. The direction to pay the other legacies in ſix months was to give time for collecting the perſonal eſtate. If the teſtator had only that preciſe ſum in this fund, the defendant might have a plauſible argument; but the fact oppoſes that.

Mr. Grant, and Mr. Stratford for the defendant—I lay out of the caſe all argument from the legacy ſuppoſed to have been given by the will. It does not appear to have been ſtruck out, when the teſtator made the codicil, nor at what time it was done. It might have been long before. It does not appear, what the fluctuation of his intention might have been between the dates of the will and the codicil. The legacy given by the codicil cannot be argued to be a ſubſtitution at the moment of a better legacy for one given by the will. The annuity of 10*l.* remains ſtanding in the will. The teſtator knew perfectly well how to give pecuniary legacies and legacies of ſtock. He directs, when his pecuniary legacies are to be paid. The phraſe in the codicil is no where made uſe of in the will. In that the word "*ſum*" occurs, which points to money. If he had ſaid "1000*l.* my Bank Annuities," it would be clearly ſpecific. A legacy of 1000*l.* Bank Annuities would not be ſo ſpecific as "1000*l.* out of my Bank Annuities." That ſhews, he had more. If he meant a pecuniary legacy, what poſſible reaſon could

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could there be for giving it out of the Bank Annuities? The alluſion to the ſtock is introduced for no other purpoſe than to make it ſpecific. The direction as to the month is material. If it is a pecuniary legacy, why is that annexed to it any more than the others? There is a plain obvious meaning, ſuppoſing it a legacy of ſtock; that the legatee might have the benefit of the accruing dividend; which ariſes without any effort or pains of his own. Money would not be ſo certainly productive of intereſt. It cannot be without ſome intention; and no other can be reſorted to but an intention to give ſtock. The proof of the value of the ſtock at the date of the codicil is not material. The teſtator did not ſuppoſe he ſhould die upon that day. A legacy of a croſs to be taken from a necklace is clearly ſpecific: ſo a horſe out of his ſtud at *Newmarket*. *Danvers* v. *Manning* (*a*). Upon *Purſe* v. *Snaplin* (*b*) and all the other caſes it muſt be ſaid, the word "*my*" makes it ſpecific. The act to be done by the executor is of the nature of the thing given: that is, the ſtock is to be transferred within one month. It was reaſonable to give the executor time to go to the Bank and make the transfer. That may be the reaſon.

Mr. Piggott in reply was ſtopped by the Court.

Maſter of the Rolls—I am of opinion with the plaintiff; but not upon the will and eraſure. That rather makes againſt him; for in the will the expreſſion "*the ſum*" is uſed. Then the phraſe being varied in the codicil, and this legacy being given without the expreſſion "*the ſum*," if I was to decide upon that, I ſhould be againſt the plaintiff. But for the reaſons given by Mr. *Grant* it would be a very erroneous ground of deciſion to call in aid ſuch doubtful points concerning the time, when the eraſure was made, and what was floating in his mind. Therefore I lay that entirely out of the caſe, and decide upon the conſtruction of the codicil itſelf. I admit as to the legacy in the beginning of the will, the conſtruction muſt be, that it is 100*l.* Bank Annuities. If the legacy given by the codicil had been "of my ſtock" or "in my "ſtock," or "part of my ſtock," I ſhould have held it clearly a ſpecific gift of an *aliquot* part of the ſtock. The pecuniary legacies

"Of my "ſtock," or "in my "ſtock," or "part of my "ſtock," will make a legacy ſpecific.

(*a*) 2 *Bro. C. C.* 18.

(*b*) 1 *Atk.* 414. See Mr. *Sanders*'s notes to that caſe, Mr. *Cox*'s notes to *Hinton* v. *Pinke*, 1 *P. Wms.* 539. and *Rider* v. *Wager*, 2 *P. Wms.* 328. *Roberts* v. *Pocock*, *ante*, 150. *Chaworth* v. *Beech*, *Innes* v. *Johnſon*, *ante*, 555. 568, *Coleman* v. *Coleman*, *ante*, vol. 2. 639.

are directed to be paid within ſix months. The teſtator thinking he had not done ſufficient for the plaintiff by the annuity of 10*l.*, but that for his integrity, ſobriety, and good conduct, he deſerved ſomething more, gives him this legacy by the codicil. A gift of 1000*l.*, no doubt, means 1000*l.* *ſterling*: but undoubtedly that may be explained. It is ſaid, the words, that follow, "out of "my Reduced Bank Annuities 3 *per cents*" are ſynonymous to the words I have ſtated: "part of my ſtock" *&c.* They are not ſynonymous by any means; for 1000*l.* may be raiſed by ſelling ſo much ſtock as would produce that ſum, or by borrowing upon it. Suppoſe, it was 1000*l.* out of a leaſehold houſe: it would be a charge. The direction as to the month is very material, if ſlight circumſtances are to be called in aid. Why ſhould one month be mentioned? Why ſhould not the transfer be immediately? Why not as ſoon as conveniently might be; giving him all the accruing dividends in the mean time? The only effect of that direction would be to deprive him of the dividend; which could not be the intention. There certainly muſt be time for the actual transfer: but the teſtator might have given the plaintiff all the dividends. Every one knows, a ſpecific legacy of a *Corpus* paſſes from the death of the teſtator. It veſts immediately from that time. There is a very untechnical expreſſion uſed with regard to ſtock. There is literally no ſuch thing as 100*l.* ſtock. The 3 *per cents* are only perpetual annuities, granted for ever, redeemable by the public upon the payment of a certain ſum of money. Knowing, however, that in common parlance people ſpeaking of ſtock will ſo expreſs themſelves, we muſt apply it. But whenever there is a legacy of a given ſum, there muſt be poſitive proof, that it does not mean *ſterling* money, in order to make it ſpecific. If this legacy had been expreſſed thus, "part of my Reduced Bank Annuities," or "in my Re"duced Bank Annuities," I could not have conſidered, that the teſtator meant any thing but an identical part of that *Corpus*: but when the phraſe is "1000*l.* out of my Reduced Bank Annuities," the ſenſe is, that the executor ſhall raiſe 1000*l.* by ſelling ſo much of that ſtock; and this being a fund, to which he can have immediate recourſe, he is ordered to do ſo within a month. Therefore, though in my private opinion there is great doubt, what he meant, I muſt hold this to be a legacy of 1000*l.*, to be raiſed and paid out of that fund, as a ſpecific ſecurity and more eaſily come at, than a legacy out of his eſtate in general might have been.

A ſpecific legacy veſts immediately from the death of the teſtator.

The 3 *per cents* are perpetual annuities granted for ever, redeemable by the public. The common expreſſion therefore of "100*l.* "ſtock," *&c.* is incorrect.

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Declare, that the ſum of 1000 *l. ſterling* is to be raiſed out of the teſtator's 3 *per cent.* Reduced Bank Annuities, and paid to the plaintiff: let the Maſter compute intereſt upon it at the rate of 4 *per cent.* from the end of a month after the teſtator's death. I am not inclined to give the plaintiff coſts. He ought to be ſatisfied with his legacy: but, I think, I muſt according to the courſe of the Court give him coſts out of the eſtate.

Another rule is, that no legacy is to be held ſpecific, unleſs demonſtrably ſo intended.

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ROGERS *v.* MACKENZIE.

Contribution decreed between the joint and ſeparate eſtates: the former having paid beyond the proportion of a debt to the Crown under an Extent; and the bankrupts being bound jointly and ſeverally.

A debt to the Crown preferred to creditors under a bankruptcy: the ſheriff being in poſſeſſion under ſeveral Extents; one of which for part of the debt was teſted the day the proviſional bargain and ſale and aſſignment were executed: the others having iſſued ſubſequently.

THE bill was filed by the aſſignees of the eſtate and effects of *Henry Roberts*, *John Roberts*, and *Mark Gregory*, bankrupts, againſt the aſſignees of the ſaid *Mark Gregory* and *Thomas Gregory* bankrupts. The prayer of the bill was, that an account may be taken of the ſeveral ſums of money paid by the plaintiffs in diſcharge of a debt to the Crown, and the expences attending the ſame, and the application to the Court of *Exchequer*; and how much the reſpective eſtates of the ſaid *Roberts* and Co. contributed reſpectively to the diſcharge thereof; and that it may be declared, that the plaintiffs under the circumſtances are entitled to a contribution equal to one-fourth part of the ſum of 6666 *l.* 13 *s.* 2 *d.* from the eſtate of the ſaid *Mark Gregory*; and that the defendants may be decreed out of the eſtate of the ſaid *Mark Gregory* come to their hands to pay to the plaintiffs ſo much as will make up one-fourth of what ſhall be found to have been ſo paid by plaintiffs in diſcharge of the debt to the Crown and the expences attending the ſame, *&c.*

By the decree made upon the 18th of *April* 1796 an account was directed of all ſums of money paid by the plaintiffs in diſcharge of the debt to the Crown, in the pleadings mentioned, and the expences of the application to the Court of Exchequer attending the ſame; and it was declared, that the plaintiffs as aſſignees of *Roberts* and Co. ought to be reimburſed the money paid by them in diſcharge of the ſaid debt to the Crown and charges, for which the ſeveral real eſtates of the ſaid bankrupts were ſeiſed under the Extent, in ſuch proportion as the ſaid eſtates ought to bear; and it was ordered, that the Maſter ſhould ſtate, what proportion the real eſtate of *Mark Gregory*, which had been ſold by the defendants ought to contribute; without prejudice to any queſtion, which might ariſe upon the accounts to be taken between the joint-eſtates of the ſaid bankrupts and the reſpective demands of the joint and ſeveral creditors under each commiſſion.

The Maſter by his Report ſtated, that ſome time previous to *November* 1791 *Henry Roberts*, *John Roberts*, and *Mark Gregory*, as co-partners carried on the buſineſs of bankers under the firm of *Roberts* and Co. in the Iſle of *Wight* in equal ſhares; and *Mark Gregory* was at the ſame time a partner in a mercantile houſe in *London* under the firm of *Mark* and *Thomas Gregory*. On the 9th of *November* 1791 *Mark* and *Thomas Gregory* were declared bankrupts; and the defendants were choſen aſſignees of their eſtate; and a proviſional bargain and ſale, bearing date the 9th of *November* 1791, of the real eſtate, and an aſſignment of the perſonal eſtate, were duly executed; but the proviſional aſſignee did not obtain poſſeſſion under the ſame previous to the iſſuing of the Extent for 3100 *l.* hereinafter-mentioned; and a few days afterwards *Henry Roberts*, *John Roberts*, and *Mark Gregory*, were alſo declared bankrupts. The Receivers of Taxes had been accuſtomed to place monies collected for taxes in the bank of *Roberts* and Co.; and at the time of their failure they were indebted to the Crown in reſpect of ſuch Receivers in ſeveral ſums, amounting in the whole to 6401 *l.* 1 *s.* 8 *d.* Two Extents for 3100 *l.*, teſted the 9th of *November* 1791, and directed to the ſheriffs of *London* and *Hants*, iſſued for recovery of the ſaid debt. The ſheriffs of *London* under the Extent ſeiſed the ſeparate property of *Mark Gregory*; and ſold the ſame for 824 *l.* 15 *s.* 6 *d.*; and deducting 43 *l.* 14 *s.* 6 *d.* for poundage applied the remaining 781 *l.* 1 *s.* in part diſcharge of the debt to the Crown.

On the 10th of *November* 1791 the ſheriff of *Hampſhire* ſeiſed under the Extent various parts of the joint and ſeperate real and perſonal eſtate and effects of *Henry Roberts*, *John Roberts*, and *Mark Gregory*, in the Iſle of *Wight*; and he continued in poſſeſſion under ſeveral other Extents, ſubſequently iſſued, and teſted reſpectively the 11th and 16th of *November* 1791. In *Hilary*

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Term 1792 the plaintiffs obtained an order in the court of *Exchequer*, that on payment by them of what ſhould be found due to the Crown and the expences the ſheriff of *Hampſhire* ſhould deliver up to the plaintiffs all the goods and chattels ſeiſed by him under the ſaid ſeveral Extents; which he accordingly did on payment by the plaintiffs of the ſums directed by the order. The plaintiffs in order to pay the ſaid ſeveral ſums, amounting together with the expences to 6710 *l.* 7 *s.* 8 *d.* were obliged to borrow money, and to ſell ſuch part of the joint and ſeparate property of the ſaid bankrupts as came to their hands; and out of the produce thereof the debt was diſcharged. The produce of the ſeparate eſtate of *Mark Gregory* received by the plaintiffs amounted to 292 *l.* 18 *s.* 7 *d.* only; which being added to 824 *l.* 15 *s.* 6 *d.* produced by the ſeparate eſtate of *Mark Gregory* ſold by the ſheriffs of *London*, made 1117 *l.* 14 *s.* 1 *d.*; which is the whole amount the ſeparate eſtate of *Mark Gregory* had contributed to the diſcharge of the ſaid debt of 6710 *l.* 7 *s.* 8 *d.*; and the plaintiffs paid 5592 *l.* 13 *s.* 7 *d.* the reſidue of the ſaid debt and expences. *Henry Roberts*, *John Roberts*, and *Mark Gregory* were jointly and ſeverally bound as ſureties to the Crown for the Receivers on whoſe account the ſaid debt to the Crown was contracted.

The Maſter therefore certified, that the real eſtate of *Mark Gregory* ought to pay the further ſum of 559 *l.* 17 *s.* 10 *d.*; which with the ſum of 1117 *l.* 14 *s.* 1 *d.* would make 1677 *l.* 11 *s.* 11 *d.*; being one-fourth of the whole debt to the Crown and the charges; for which the ſeveral eſtates of the bankrupts were ſeiſed.

To this Report two exceptions were taken: firſt, that the Maſter ought to have certified, that the eſtate and effects of *Mark Gregory* had contributed his fair proprortion of ſuch debt and charges; and that his real eſtate ought not to pay any farther ſum whatever; becauſe it appeared by a ſtatement of facts brought in before the Maſter and admitted on both ſides, that the plaintiffs had at different times ſince the ſaid order of the Court of *Exchequer* received out of the joint partnerſhip effects of *Henry Roberts*, *John Roberts*, and *Mark Gregory*, monies ſufficient to reimburſe or repay the monies paid by them in diſcharge of the ſaid debt and charges: ſecondly; that the Maſter inſtead of calculating the proportions of the debt to the Crown at 6401 *l.* 1 *s.* 8 *d.* ought only to have calculated it at 3100 *l.*; becauſe it appeared by a ſtatement of ſacts brought before him, and admitted on both ſides, that an aſſignment of the joint effects of *Mark* and *Thomas Gregory* and a bargain and ſale of the ſeparate real eſtates of *Mark Gregory* were executed to a proviſional aſſignee for the immediate preſervation thereof on the 9th of *November* 1791; and that all the eſtate and effects of *Mark Gregory*, which were ſeized by the ſheriff of *Hants* under the Extent for 3100 *l.*, and of which he continued in poſſeſſion under the other Extents, were not ſeized, nor were any of the Extents except that for 3100 *l.* iſſued, until after *Mark Gregory* had committed acts of bankruptcy, and after *Mark Gregory* and *Thomas Gregory* had been declared bankrupt, and an aſſignment of their perſonal eſtate and a bargain and ſale of the real eſtates of *Mark Gregory* had been executed to a proviſional aſſignee.

The Attorney General in ſupport of the Exceptions contended, that the proviſional aſſignment altered the property of the real eſtate; and whatever was paid to the Crown after that was paid wrongfully; alſo, that it was a joint debt to the Crown by the three partners; and no one individual was anſwerable.

The Solicitor General and Mr. Short for the plaintiffs—It is a general principle of law, that, when one ſurety pays the whole debt, there ſhall be a contribution: *Sir Edward Deering* v. *Lord Winchelſea*, lately before the Court of *Exchequer*: *Praed* v. *Gardiner*, before Lord *Thurlow* 6th of *December* 1788. It is unjuſt to throw the whole burthen on one eſtate. They were bound to the Crown jointly and ſeverally. Their ſeveral eſtates are therefore equally liable. By accident they are unequally charged. To correct that inequallity is within the principle, upon which the Court compels contribution; as in the caſe of ranſom in *Lane*; and where it is neceſſary to throw goods overboard.

As to the ſecond exception, it is not competent to the defendants to raiſe the point after the order of the Court of *Exchequer*.

The Attorney General in reply ſaid, that the caſes cited were caſes of ſureties for the principal debtor: but the queſtion in this caſe is, whether *Roberts* and Co. were the principal debtors, as between that houſe and the individuals conſtituting that houſe.

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The LORD CHANCELLOR ſaid, he rather adhered to the opinion he had given at the time of the decree. But upon the exception it was impoſſible to do any thing; for it controverts the principle of the decree; and the ſecond exception is totally a miſtake.

Exceptions over-ruled.

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A queſtion ariſing in Equity, that prevents the aſſertion of a legal right, does not alter the tribunal. Therefore the Court will not determine a queſtion of partnerſhip in the event of a bankruptcy any more than of a death, or than it would determine a claim as heir, without a trial at law, unleſs perfectly ſatisfied; though the evidence is all in ſupport of the claim. The Court expreſſed great doubt, whether, the ſtock in trade being in the poſſeſſion of the bankrupt ſolely, the claim of partnerſhip could be ſuſtained upon the Statute 21 James I, c. 19. §. 10. 11.

BINFORD v. DOMMETT.

IN *May* 1779 a commiſſion of bankruptcy iſſued againſt *Matthew Dormer*; upon which he was declared a bankrupt.

The bill was filed againſt the bankrupt and the aſſignees under the Commiſſion; ſuggeſting a partnerſhip between the plaintiff and the bankrupt, upon the propoſal of the latter, that the plaintiff ſhould become concerned with him in carrying on the buſineſs of ſoap-manufacturers upon the premiſes of the bankrupt in *Shoreditch*; and that as a conſideration for the plaintiff's being admitted he ſhould purchaſe in his own name tallow and other raw materials for the concern, to be manufactured into ſoap by the bankrupt for their joint benefit; and the bankrupt was to receive two guineas a-week as a compenſation for his trouble in manufacturing the ſoap. The bill ſtated, that an agreement was accordingly entered into upon the 18th of *March* 1797. The plaintiff purchaſed a quantity of reſin from the bankrupt. About the 21ſt of *March* the plaintiff in purſuance of the agreement purchaſed 55 caſks of tallow for 1122*l.* 18*s.* 3*d.*, and drew three bills of exchange upon, and accepted by, *George Grant* Eſq. for 400*l.* each; and delivered the tallow to the bankrupt. Upon the 23d of *April* the plaintiff purchaſed a quantity of barilla aſhes for 250*l.* and other articles; which were delivered to the bankrupt. The aſſignees took poſſeſſion of the ſoap, tallow, and other articles, belonging to the partnerſhip; and ſold them, notwithſtanding a notice from the plaintiff upon the 24th of *June* 1797, demanding a delivery of them, and threatening to bring an action.

The bill alleged, that the bills are out-ſtanding, and the plaintiff is liable to them; and prayed an account of the joint property and the debts, upon the footing of the partnerſhip.

The aſſignees by their anſwer ſtated, that they do not know, whether any ſuch agreement was entered into; or whether the plaintiff ever became concerned with the bankrupt in the ſaid buſineſs; or whether the plaintiff purchaſed the articles in the bill mentioned, or contracted any debts in reſpect thereof, *&c.*; and that they do not know or believe. that ſuch tallow, ſoap, or other articles, at the manufactory, when the Commiſſion iſſued, were the joint property of the plaintiff and the bankrupt: on the contrary they believe they were the ſole property of the bankrupt.

The defendant, the bankrupt, being examined as a witneſs, depoſed, that in *March* 1797 the plaintiff informed him, he could obtain ſome bills for the deponent, if the deponent could procure goods thereon to enable him to carry on the ſaid ſoap-manufacture. The deponent replied, he thought he could; and aſked a broker; who ſaid, he could: upon which the 55 caſks of tallow were purchaſed, and paid for by the three bills mentioned in the bill, and ſent to the deponent's premiſes. A few days afterwards the plaintiff and *Thomas Bullock* Eſq., and the deponent had a meeting; where terms were propoſed by the plaintiff and *Bullock* relative to the ſaid tallow; and *Bullock* ſaid, he was guarantee to *Grant* for the bills delivered in payment; and that he ſhould require only the principal (meaning, that he ſhould expect to be indemnified againſt the conſequences of his being ſuch guarantee); and that the plaintiff and the deponent might ſhare the profits ariſing from the ſaid concern equally between them; and *Bullock* ſaid, if there ſhould be no profit from the ſaid concern, he would take care, that the deponent ſhould be ſatisfied for his trouble, ſkill and judgment in manufacturing the ſaid 55 caſks of tallow into ſoap, and alſo for the uſe of his ſaid premiſes; in all which the plaintiff and the deponent acquieſced. The ſaid agreement was verbal, and never reduced into writing. A ſmall quantity of the ſoap was ſold.

This witneſs proved the allegations of the bill as to the purchaſe of the *barilla* uſed in the manufacture, and as to the aſſignees having taken poſſeſſion, *&c.*

Solomon Davis depoſed, that in *March* 1797 he had ſeveral meetings with the plaintiff and the bankrupt for the purpoſe of ſettling the agreement intended between them concerning the carrying on the buſineſs of ſoap-manufacturers in partnerſhip, &c., as in the bill is ſtated. At one ſuch meeting, previous to the purchaſe of any goods for the buſineſs, it was verbally ſettled and agreed between the plaintiff and *Dormer*, that the plaintiff ſhould purchaſe in his own name tallow, *barilla*, reſin, and other articles neceſſary for the manufacture; and that the ſame ſhould be manufactured into ſoap for ſale by *Dormer* upon the premiſes on the joint account of himſelf and the plaintiff; and *Dormer* ſhould receive out of the profits either 2 *l.*, or 2 *l.* a week; which, he does not recollect, in conſideration of the premiſes belonging to him, and as a compenſation for his trouble; and that the reſidue, after deducting the debts and expences, ſhould be divided in equal ſhares between the plaintiff and *Dormer*; and that the plaintiff ſhould purchaſe a quantity of lees, then upon the premiſes belonging to *Dormer*, at a valuation.

This witneſs proved the delivery of various articles upon the premiſes for the purpoſe of the manufacture by the order of the plaintiff, and the delivery of the bills in payment for the tallow.

Mr. *Bullock* proved the agreement to the ſame effect as in the bill; and that the bankrupt was to have a weekly allowance. Upon his croſs-examination he depoſed, that he gave the plaintiff ſundry bills to get diſcounted; who uſed from time to time to give him money on account. In the courſe of this dealing the plaintiff became indebted to the deponent: but he could not ſtate to what amount; the account not being balanced.

The purchaſe of the tallow and *barilla* on the joint account, and the delivery of the bills in payment were alſo proved by the broker.

When the cauſe was opened, the Maſter of the Rolls was clearly of opinion, that the point upon the partnerſhip muſt be tried at law; and put the caſe of a queſtion, whether a party is heir at law; which could not be determined here: but the Counſel for the plaintiff inſiſted, that they were entitled to a decree upon the evidence.

Mr. Grant and Mr. Fonblanque for the plaintiff.—If the Court declines the juriſdiction in this caſe, why muſt not an iſſue be conſequent upon every ſuit by one partner againſt the executors or aſſignees of another? There is no objection to a verbal partnerſhip either in this Court or at law. It is not of courſe to have an iſſue; and in this caſe all the evidence is on one ſide; and the anſwer is mere inſinuation.

Mr. Lloyd and Mr. Johnſon for the defendants—The aſſertion of the defendants, that they do not believe there was a partnerſhip, is in their ſituation equivalent to a denial. The bankrupt was in poſſeſſion. There were no bills of parcels or other papers with the name of the plaintiff upon them in their cuſtody. There was nothing to give them any intimation as to him. In ſeveral inſtances it is of courſe to ſend it to law. It is abſolutely neceſſary for ſuch a plaintiff as this to make ſome ſort of caſe to entitle himſelf to an iſſue. Upon a bill by an heir at law for poſſeſſion, an account, title deeds, *&c*, if it is denied, that he is heir at law, whatever evidence he may produce from regiſters, witneſſes, *&c.* the bill is always retained, with liberty for him to bring an ejectment; or an iſſue is directed. The Court will ſend the facts, which give it juriſdiction, to be tried at law. There is a right to the croſs-examination of the witneſſes. Depoſitions are not to be concluſive upon the facts, which alone give the Court juriſdiction. The fact of the partnerſhip is not clearly made out. There is ground for ſuſpicion, that the whole truth of the caſe is not before the Court. There are no bills of parcels in their joint names; and upon the evidence a farther examination, and a *vivâ voce* examination, is neceſſary. The very circumſtance of being a dormant partner is very ſuſpicious. A Court of Equity cannot determine the fact, whether it is a colourable poſſeſſion within the *Statute* (*a*), giving another man a falſe credit, leaving with him the whole property. Suppoſe, an execution was taken out by a ſeparate creditor: he could not get rid of it at law. This claim is full of doubt; and there is every reaſon to believe, one half of the truth is not told.

Maſter of the Rolls—Suppoſe, *Dormer*, inſtead of becoming a bankrupt, had died: would it have been enough then to have had brought a bill, and upon this evidence to have had the partnerſhip tried in Equity? No: the anſwer would have been, he muſt

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(*a*) 21 *James* I. *c.* 19. § 10, 11. See *Ryall* v. *Rolle*, 1 *Atk.* 165; 1 *Veſ.* 348.

No action of trover between tenants in common.

bring trover. Inſtead of that a bankruptcy has happened; and therefore it does not not ſurvive: but it muſt be decided the ſame way. There is no difference. The queſtion is only, whether theſe goods were the property of the bankrupt ſolely, or not. If there is a poſſibility of doubt upon it, it muſt be tried at law: I do not care, how. One tenant in common cannot bring an action of trover againſt the other (*a*): but the queſtion is, whether they were tenants in common. If I muſt try this, I am bound, whenever there is a bankruptcy, to try this point; though the other party ſays, he deſires it to be tried at law. I am ſtill therefore of the ſame opinion.

Mr. Grant in reply—The caſe of the heir at law is diſtinct. There is a legal title. There is nothing of that kind between partners. As between them and the reſt of the world there is a legal claim: but *inter ſe* their intereſts are equitable only. The repreſentative muſt ſtand upon the claim of his teſtator. A death is one event: a bankruptcy, another. The bankrupt is a competent witneſs; and the accident of his death would have deprived them of that advantage. That accident not having occurred, he is a competent witneſs; and particularly credible, depoſing againſt himſelf. No doubt, if the Court is not ſatisfied upon the fact, the defendant may demand an iſſue. But this caſe does not properly belong to the conuſance of a Court of Law: ſo far from it, they admit, it could not be tried at law, except by the direction of a Court of Equity, and upon terms impoſed. There can be no action of trover between partners. The ground is in this Court. The propoſition, that without diſcretion or choice the Court is under a compulſory obligation to ſend the queſtion to law, was not long inſiſted on: but they now contend, that the evidence is not ſatisfactory. What calls upon the Court to doubt the facts ſtated in the bill and by the evidence, or to require more information? The defendants do not ſtate the ground of their belief, or any circumſtances to do away the facts we inſiſt upon. It was competent to them, and they were called upon, to give evidence. No evidence has been entered into to diſcredit theſe witneſſes: nor have the defendants croſs-examined them, with a view to diſcredit them. A doubt with regard to the teſtimony cannot be raiſed by the mere poſſibility, that before a jury ſome-

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(*a*) *Brown* v. *Hedges*, 1 *Salk.* 290. *Holliday* v. *Camſell*, 1 *Term Rep. B. R.* 658.

thing may be raiſed to impeach their teſtimony. That would prove too much; that no written depoſitions can ever be received, even, where the teſtimony is all one way and uncontradicted. No doubt is ſuggeſted, that theſe bills were the bills of the plaintiff, not of the bankrupt. That is admitted. The Court is required upon probability to diſbelieve poſitive teſtimony. It is not to be ſuppoſed, that the plaintiff would advance his money without any ſecurity, and with almoſt a certainty of loſing it. There is no probability of any fuller diſcloſure upon a trial; nor any allegation, that they have any witneſſes to examine to contradict any fact.

Maſter of the Rolls—I think, this caſe is put upon the true ground by Mr. *Grant*: that is, whether the nature of the caſe and the nature of the evidence are ſuch, that I can with ſatisfaction to myſelf, conſidering the nature of the caſe and the nature of the evidence, decide, that at all events there was a partnerſhip; and grievous would be the circumſtances of this Country, if, becauſe there is any number of witneſſes, whatever may be their credibility upon paper and the circumſtances of the depoſitions, to prove, that there was a partnerſhip in property, of which the bankrupt was in outward poſſeſſion, therefore a Court of Equity is to decide, that there was ſuch partnerſhip. I ſhould open ſuch a door, that there would hardly be a bankruptcy in *London* without an attempt to produce evidence for that purpoſe; which cannot be contradicted from the nature of it.

I am not ſorry, though my firſt impreſſions upon this point are not removed, and though the time it has taken can now be very ill ſpared, that this cauſe has been heard throughout; for when gentlemen of eminence at the Bar reſiſt the firſt impreſſions of the Court, it is my duty, however ſatisfied I may feel myſelf, not to decide, till I hear, what can be ſaid.

Upon the claim of partnerſhip ſet up by this plaintiff I have great doubt, whether under the *Statute* of King *James* this ſort of partnerſhip could be ſet up; whether it is not the property of the bankrupt in reſpect of the bankruptcy upon the fact itſelf. I have always underſtood, that queſtions ariſing in Equity, that prevent a man from purſuing a legal right, do not alter the tribunal. The

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Binford *v.* Dommett.

caſe of the heir, that I put, has not been ſatisfactorily anſwered. Suppoſe a reſulting truſt upon a deviſe, that bars the heir at law; and the queſtion is, who is the heir: can any number of witneſſes prevent the other party from ſaying, he deſires it to be tried; that it is not a reſulting truſt for that perſon, however clearly it may be made out? If the party had died inſtead of becoming bankrupt, it muſt have been tried at law (*a*). Then it is impoſſible to ſit here any time without ſeeing, that a *vivâ voce* examination of witneſſes is much more ſatisfactory than depoſitions, where a poſſibility of doubt can be raiſed; and if ever a caſe exiſted, that required a *vivâ voce* examination, this is one. There cannot be an action, it is true; becauſe upon this claim they are tenants in common: but does that put him in a better ſituation than if that point of law did not ſubſiſt? I ſhould do a moſt dangerous thing, if I was to decide this queſtion upon theſe depoſitions. The plaintiff is bound to make it out by producing theſe witneſſes; and that is all the advantage he ought to have. Mr. *Grant* has very ingeniouſly argued, that then an iſſue may be had at once for aſking in every caſe: but that is not ſo. The plaintiff muſt bring *primâ facie* evidence: but that is not concluſive. Upon the whole I am clearly of opinion, that I cannot with ſatisfaction to myſelf and a certainty of doing juſtice declare, that there was ſuch a partnerſhip as is alleged by the plaintiff; and I muſt leave him to make it out according to that right, to which the other party is entitled.

Direct two iſſues: 1ſt, whether the articles in queſtion were the ſole property of the bankrupt at the time of the bankruptcy:

Secondly, Whether the plaintiff was entitled to any and what ſhare in the ſaid articles at the time of the bankruptcy.

(*a*) The legal title of the ſurvivor however in theſe caſes will not prevail againſt the equitable intereſt of the repreſentative of the deceaſed partner, *ante*, vol. 1. 434, 435.

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FRANKS *v.* COOPER.

A right of retainer is not prejudiced by the circumſtance, that the adminiſtration is granted to another for the uſe of the creditor, a lunatic, any more than if *durante minoritate*; nor, that the debt is due to a truſtee.

Upon a deficiency of aſſets adminiſtered in this Court a value muſt be ſet upon an annuity at the time of the death; and the annuitant can claim only in reſpect of that.

UPON the death of —— *Franks* in 1789 inteſtate adminiſtration was granted to his daughter, the defendant *Iſabella Cooper*, for the uſe of his widow, a lunatic, during her lunacy.

The decree made in 1790 directed the uſual accounts; and the aſſets appearing by the Maſter's Report to be deficient, when the cauſe came on for farther directions, a queſtion aroſe upon a right of retainer inſiſted upon by the defendant in reſpect of a bond given to a truſtee to ſecure an annuity to the widow, and to the extent of the arrears accrued ſince the death of the inteſtate.

The Attorney General and Mr. Holliſt for the defendant—No doubt, the adminiſtratrix is entitled to this ſpecies of retainer; though the bond was given to another perſon as her truſtee. *Cockcroft* v. *Black* (*a*); which, notwithſtanding the doubt expreſſed in the note, is right both at law and in equity. *Loane* v. *Caſey* (*b*) is a clear authority at law; and the late Lord Chief Juſtice *Eyre*, when preſiding in the Court of *Exchequer*, held the ſame doctrine.

Upon the other point, in *Hough* v. *Riley* Lord *Thurlow* directed a value to be ſet upon the annuity, including the arrears for fifteen years.

Mr. Manſfield and Mr. Stratford for the plaintiffs—It is not denied, that now there may be a retainer of a debt due to a truſtee, as of a legal debt to an adminiſtrator or executor. But upon the form of this adminiſtration, which is particular, I ſuppoſe, with a view to this queſtion, there is no right to retain.

Next, if this claim of retainer can prevail, it is quite impoſſible, that it can go to the extent contended, *viz.* that the adminiſtratrix may retain, not the debt, as it exiſted at the death of the inteſtate, but the arrears of the annuity now incurred, and likewiſe the value of the annuity, now to be ſettled: but the account of the debts and the determination of the *quantum* muſt be at the time of the death. In the caſe before Lord *Thurlow* there muſt

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(*a*) 2 *P. Wms.* 298. 2 *Eq. Ca. Ab.* 451. *pl.* 5.

(*b*) 2 *Black.* 965.

have been particular circumſtances. The aſſets are very defective; and this claim would ſwallow up the whole.

A right of retainer is not prejudiced by the circumſtance, that the adminiſtration is granted to another for the uſe of the creditor, a lunatic, any more than if durante minoritate; nor, that the debt is due to a truſtee.

The Attorney General in reply—The right of retainer would extend to the whole perſonal eſtate, if neceſſary from time to time to diſcharge the growing payments of the annuity. She would have recovered the penalty of the bond. The adminiſtration could not well be otherwiſe. The defendant being the Committee would not be permitted to adminiſter to the prejudice of the lunatic; and if it had been granted to the daughter in her own right, ſhe might have preferred this debt.

Upon a deficiency of aſſets adminiſtered in this Court a value muſt be ſet upon an annuity at the time of the death; and the annuitant can claim only in reſpect of that.

The Solicitor General (*Amicus Curiæ*) ſaid, this queſtion, as to the time, at which a value was to be ſet upon an annuity, had been before the Court; and it had been held, that any delay ought not to prejudice creditors: but it ought to be taken as at the death. In *Hough* v. *Riley* there was a very large ſurplus after paying all the creditors; and it was agreed, that a value ſhould be ſet upon the annuity; and afterwards a delay occurred in the cauſe.

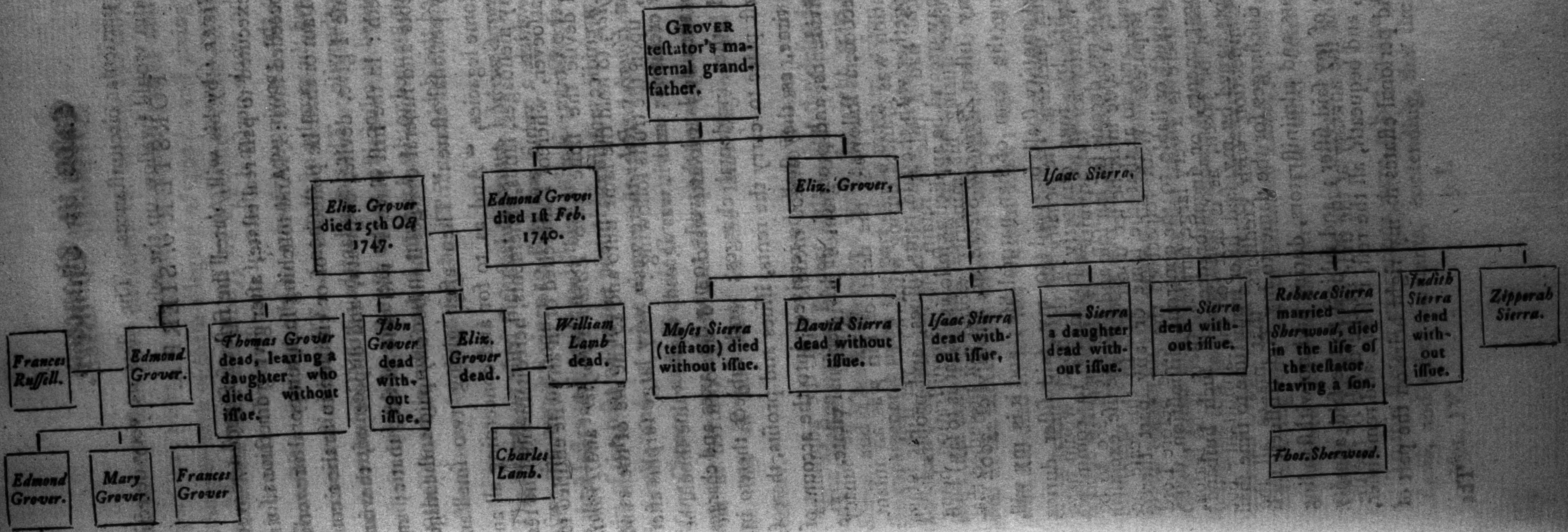
Lord Chancellor—I cannot meddle with the adminiſtration: but I think, they have granted it rightly. The lunacy ſhould not affect her. Suppoſe, the next of kin was an infant, and adminiſtration was granted during minority: yet if the infant in point of right had a title to retain, the adminiſtration being granted to another during his minority would not prejudice that right.

As to the other queſtion, the penalty of the bond would have ſtood only as a ſecurity for the annuity. If the aſſets are to be adminiſtered here, a value muſt be ſet upon it. In this caſe no lacheſs can be imputed. With reſpect to the caſe before Lord *Thurlow*, where there is a very large ſurplus, there is no reaſon, why it ſhould not be taken, as is beſt for the annuitant: but where it is a competition with creditors, that makes all the difference.

Set a value upon the annuity at the time of the death of the inteſtate.

PEDIGREE.

FORSTER *v.* SIERRA.


GROVER teſtator's maternal grandfather.
Eliz. Grover died 25th Oct 1747.
Edmond Grover died 1ſt Feb. 1740.
Eliz. Grover,
Iſaac Sierra.
Frances Ruſſell.
Edmond Grover.
Thomas Grover dead, leaving a daughter who died without iſſue.
John Grover dead without iſſue.
Eliz. Grover dead.
William Lamb dead.
Moſes Sierra (teſtator) died without iſſue.
David Sierra dead without iſſue.
Iſaac Sierra dead without iſſue,
—— Sierra a daughter dead without iſſue.
—— Sierra dead without iſſue.
Rebecca Sierra married —— Sherwood, died in the life of the teſtator leaving a ſon.
Judith Sierra dead without iſſue.
Zipporah Sierra.
Edmond Grover.
Mary Grover.
Frances Grover
Charles Lamb.
Thos. Sherwood.

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FORSTER *v.* SIERRA.

Under a reſiduary diſpoſition to the teſtator's right heirs on the part of his mother his ſiſter and a nephew by a deceaſed ſiſter were held entitled againſt remoter relations, claiming on the ground of an expreſs proviſion by an annuity for the ſeparate uſe of the ſiſter.

Moses Sierra by his will, dated the firſt of *Auguſt* 1788, and duly executed to paſs real eſtate, after giving directions for his funeral, proceeded thus: "And touching ſuch temporal or worldly "eſtate as I am or ſhall be poſſeſſed of or entitled to at the time of "my deceaſe I give, deviſe, bequeath, and diſpoſe of, the ſame "as followeth: In the firſt place I will and direct, that all my "lawful debts and funeral charges ſhall be fully paid and ſatisfied "out of my perſonal eſtate:" Then after giving two ſmall annuities and ſome legacies, "And as to for and concerning all and "ſingular my meſſuages, lands, tenements, hereditaments, and real "eſtate, whatſoever, whereof I am ſeiſed or in anywiſe entitled to, "I give and deviſe the ſame unto *Edward Forſter* and *Francis* "*Farley Forſter*, to hold the ſame unto and to the uſe of them and "their heirs, upon the truſts following:"

The teſtator then declared the truſts, to pay the taxes and charges of repairs and other incidental charges; and ſubject thereto in truſt in the firſt place to carry the rents, iſſues and profits, thereof from time to time, as they ſhall be received, into the account of the intereſt, dividends, and proceeds, of his perſonal eſtate. The will then proceeded, as follows:

"Which together with the ſaid rents, iſſues, and profits, I will "and deſire may go and be applied as follows; (that is to ſay) Firſt, "I give to my ſiſter *Zipporah Sierra* an annuity of 300*l. per* "*annum* during the term of her natural life; and it is my will, "that the ſaid annuity ſhall be paid to my ſaid ſiſter during "her natural life by four quarterly payments to commence "from the time of my deceaſe for her ſole and ſeparate uſe, excluſive "of any huſband, and ſo as that the ſame or any part thereof "ſhall not be ſubject or liable to the controul, diſpoſition, debts, "forfeiture, engagements, or incumbrances, of ſuch huſband; "and the receipts ſigned by my ſaid ſiſter from time to time ſhall "be ſufficient diſcharges for the ſame to my ſaid truſtees, their "heirs, executors and adminiſtrators, during and notwithſtanding "the coverture of my ſaid ſiſter; and ſubject to the ſaid annuity "I give, deviſe, and bequeath, all the reſt, reſidue, and remainder, "of my real and perſonal eſtates to my right heirs on the part of "my mother."

The teſtator then gave directions for keeping the truſt premiſes in repair, and power to the truſtees to make leaſes; and after bequeathing to each of them a legacy of 400 *l.*, and giving the uſual directions for their indemnity, he appointed them executors.

The teſtator died upon the 13th of *May* 1792. The real eſtate did not amount to 100*l.* *per annum*: but the reſidue of the perſonal eſtate exceeded 60,000 *l.*; and ſeveral claimants under the reſiduary diſpoſition appearing, the bill was filed by the executors; praying, that the ſeveral parties may ſet forth their claims; and that proper directions may be given for the diſtribution of the property.

The decree directed the uſual accounts, and an appropriation to anſwer the annuity given to *Zipporah Sierra*; and it was referred to the Maſter to inquire and ſtate to the Court, who were the right heirs of the teſtator on the part of his mother, living at the time of his death; and in what degree the defendants *Edmond Grover*, *Mary Grover*, and *Francis Grover*, were related to the teſtator; and whether any and what other perſons were related to him at the time of his death in the ſame degree and in the ſame manner.

The Maſter by his Report ſtated, that the defendants *Zipporah Sierra* and *Thomas Sherwood* were the right heirs of the teſtator (as coparceners) upon the part of his mother, living at the time of his death: the former being his only ſurviving ſiſter; and the latter, the only ſurviving child of another ſiſter, *Rebecca*; who died in the life of the teſtator; having had two other children, who alſo died in his life without iſſue; and all the other children of the teſtator's father and mother having died in the life of the teſtator without leaving any iſſue or deſcendants of any iſſue then ſurviving. The Report alſo ſtated, that the *Grovers* were related to the teſtator in the degree of firſt couſins once removed; and *Charles Lamb* was related to him in the ſame manner; the *Grovers* being the ſon and daughters of *Edmond Grover*, one of the ſons of *Edmond Grover*, half brother of the teſtator's mother; and *Charles Lamb* being the ſon of *Elizabeth Lamb*, a daughter of the laſt-mentioned *Edmond Grover*. The other defendants were alſo related to the teſtator in the ſame degree.

To this Report exceptions were taken by the *Grovers*, *Charles Lamb*, and other claimants, contending, that the maſter ought to

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have reported them to be the right heirs of the teſtator on the par of his mother, and not *Zipporah Sierra* and *Thomas Sherwood* and evidence had been produced with a view to prove the latte illegitimate.

Another ground of exception taken by the *Grovers* and *Lamb* was, that the Maſter had reported them to be firſt couſins once removed of the half blood of the teſtator; whereas the maſter ought to have reported them to be his firſt couſins once removed of the whole blood.

Mr. Graham, Mr. Richards, Mr. Cooke, Mr. Cox, and *Mr. W. Agar, in ſupport of the exceptions*—The Maſter has not anſwered your Lordſhip's doubt. Who were the teſtator's heirs on the part of his mother could not be a matter of doubt. But the queſtion is as to his intention. He meant to diſpoſe of all his property. Upon this will there is a neceſſary inference, that the teſtator never could mean to give the whole of his property to his right heirs on the part of his mother, technically conſidered. He muſt have meant ſome ſpecific denomination of heirs. Unleſs he had ſome excluſive meaning, the words he has adopted are perfectly uſeleſs. he makes a previous proviſion for his ſiſter *Zipporah* expreſsly of 300*l.* a year to her ſole and ſeparate uſe, with the caution uſual upon ſuch a proviſion. Can it be ſuppoſed then, that he intended to give her either a moiety or the whole of this immenſe property generally, without any qualification? If he had meant his ſiſter and nephew, he would have given it to his right heirs ſimply, as in Mr. *Selby*'s will. It will perhaps be ſaid, he had ſome doubt as to *Sherwood*'s legitimacy: but the obvious way would have been to give it to them, provided they ſhould eſtabliſh their legitimacy. The teſtator, who was a lawyer, muſt have uſed theſe words as a deſignation of the perſons.

The Attorney General for the Report, having obſerved, that the whole argument reſted upon the annuity given to the ſeparate uſe of one of theſe co-heirs; but that the teſtator ſecuring that to her meant the bulk of his property to take its chance, was ſtopped by the Court.

LORD CHANCELLOR—How can you make a perſon take under denomination of heir, who is no heir? The *Grovers* are no heirs on the part of the mother. To conſider them ſo would be to exclude the ſiſter and nephew; who are the heirs, not only on the part of the mother, but alſo on the part of the father. I muſt be enabled to ſay, I am ſatisfied he meant theſe perſons. I cannot raiſe a doubt upon this point; for, when a teſtator deviſes to the right heirs of a particular perſon, the law fixes, who is the heir.

The exceptions were overruled. The coſts of all parties were given out of the fund, except to the unſucceſsful claimants as to the inquiry with reſpect to the legitimacy of *Sherwood*.

NORMAN *v.* MORRELL.

Rolls,
July 10. 15.

Upon a queſtion as to the amount of a legacy from a doubt as to a figure, an iſſue was directed inſtead of a reference to the maſter.

Teſtatrix after giving an annuity and legacies deviſed her real eſtate ſubject to the ſaid annuity and legacies and her debts and funeral and teſtamentary expences, and the debts of her late brother. The aſſets were marſhalled in favour of a legatee by a codicil.

SARAH LONG by her will, dated the 20th of *February*, 1793, and atteſted by three witneſſes, declared, that as to her temporal eſtate ſhe gave and diſpoſed thereof, as follows. She then gave ſome pecuniary and ſpecific legacies, and among them to *Mary Norman* a tea cheſt; and ſhe gave to her ſervant *Johanna Gardiner* an annuity of 40*l.* during her life: and ſhe charged the ſaid annuity upon all her real eſtates, with power to recover it by diſtreſs and ſale of the goods, chattels, or ſtock, upon all or any part of her real eſtates. The teſtatrix then diſpoſed of her wearing apparel, and gave ſome other pecuniary legacies; and ſubject to the ſaid annuity and legacies and the payment of her juſt debts, funeral, and teſtamentary expences, and the debts of her late brother, ſhe gave all her real eſtate to *James Morrell*, his heirs and aſſigns for ever: and ſhe alſo gave and bequeathed to him all the reſt and reſidue of her perſonal eſtate not therein before diſpoſed of; and appointed him ſole executor.

By a codicil, dated the 10th of *September* 1795, the teſtatrix gave ſome other legacies, ſpecific and pecuniary, the latter in figures, and among them there was one to *Mary Norman*; and the bill was filed by her againſt the executor, claiming under the codicil a legacy of 800*l.*; and praying, that the uſual accounts may be taken; and, if the perſonal eſtate ſhall be inſufficient to anſwer the ſaid legacy, that it may be declared, that the Plaintiff is entitled to ſatisfaction of what ſhall be found due to her in reſpect thereof out of the real eſtate of the teſtatrix and the rents and profits thereof, or at leaſt to the extent of the perſonal eſtate exhauſted in payment of ſuch of her debts and legacies as ſhall appear to have effected her real eſtate.

The Defendant by his anſwer inſiſted, that the legacy given by the codicil was only 300*l.*; the firſt figure being "3," and not "8."

With reſpect to the other part of the prayer of the bill the anſwer ſtated, that the perſonal eſtate amounted only to 2000*l.*; and the mortgages and bond debts alone amounted to 4000*l.*; in payment whereof and of the funeral expences the defendant exhauſted the perſonal eſtate, except what was ſpecifically bequeathed.

Upon the firſt point, whether the firſt figure of the ſum bequeathed to the plaintiff by the codicil was "8" or "3," both parties went into evidence. Mr. *Short* for the plaintiff, admitted the figure originally was "3;" but he contended, that it had been altered to "8" by drawing the pen over it again and extending the upper and lower parts of the figure towards the centre. An engraver was examined upon the ſubject; and letters written by the teſtatrix, who was of an advanced age at the date of the codicil, were proved, in order to ſhew, how ſhe made her figures. There was alſo evidence of her averſion to writing.

The evidence was not read: but the Maſter of the Rolls upon inſpection of the original codicil thinking it extremely doubtful, recommended a compromiſe; for which purpoſe it ſtood over: but the parties not coming to an agreement, the Court was proceeding to direct the ſame reference to the Maſter, that was made in *Maſters* v. *Maſters* (a); but obſerving, that exceptions would be taken to the Report, and it muſt end in an iſſue, an iſſue was directed at once, whether the legacy given to the Plaintiff by the codicil was 800*l.*; and if not, with liberty to indorſe any other ſum.

Upon the other queſtion the decree directed that the aſſets ſhould be marſhalled.

(a) 1 *P. Wms.* 421.

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Rolls.
Feb. 9. 15.
1797.
July 17.
1799.

Truſt in marriage articles to pay certain funds, the property of the wife, to all and every her child and children in ſuch parts, ſhares, and proportions, as ſhe ſhould by will give, *&c.* and for want of ſuch gift, *&c.* to all and every her child and children part and ſhare alike; and for want of ſuch iſſue, over. By her will ſhe gave ten guineas, part of the fund, to her eldeſt ſon, declaring, that he was otherwiſe provided for by the will of his uncle; and the remainder ſhe gave to all her other children, naming them, equally, with ſurvivorſhip in caſe of the death of any during minority, and before receipt of his, her, or their ſhares; and in caſe of the death of her eldeſt ſon before he comes to the poſſeſſion of his uncle's fortune, ſhe gave her ſecond ſon only ten guineas. The only proviſion of the eldeſt ſon was a remainder in tail after the life eſtate of his father; who ſurvived his wife. The Court was of opinion, firſt, thoſe children illegitimate, being born after elopement, and no acceſs, clearly could not take: ſecondly, that the ſhare appointed to a child, who died in the life of her mother, lapſed: but the caſe was determined upon the third point; that under the circumſtances the appointment of ten guineas was illuſory; and therefore the whole was void; and the fund was diſtributed among the ſurviving children and the repreſentative of the deceaſed child; the intereſt veſting on the birth, liable to be deveſted only by appointment.

BY indentures, dated the 4th of *December*, 1759, previous to the marriage of *George Aclom* and *Ann Evat*, ſeveral funds, the perſonal eſtate of *Ann Evat*, were veſted in truſtees, upon truſt to lay out the ſame in the public funds or upon landed ſecurities, and to pay the intereſt and profits to the ſeparate uſe of *Ann Evat* for life; and after her deceaſe upon farther truſt, that they ſhould pay the principal and all arrears of intereſt, that ſhould then remain due, to all and every the child and children of her, the ſaid *Ann Evat*, in ſuch parts, ſhares, and proportions, as ſhe, the ſaid *Ann Evat*, ſhould notwithſtanding her coverture by her laſt will and teſtament in writing, or any other writing purporting to be her will, give, deviſe, and diſpoſe of, the ſame or any part thereof; and for want of ſuch gift, deviſe and diſpoſition, that the truſtees ſhould within one year next after the deceaſe of the ſaid *Ann* pay the ſaid principal ſum and all arrears of intereſt, that ſhould then be due, to all and every the child and children of her, the ſaid *Ann*, part and ſhare alike; and for want of ſuch iſſue, then upon truſt, that they ſhould after the deceaſe of the ſaid *Ann Evat* pay one moiety or half part of the ſaid principal, and all the arrears of intereſt to ſuch perſons as the ſaid *Ann Evat* ſhould by her will diſpoſe of the ſame, and the other moiety or half part thereof to the ſaid *George Aclom*, his executors, adminiſtrators or aſſigns; and in default of ſuch bequeſt, then as to one moiety or half part to *George Aclom*, his executors, &c. and the other moiety to the brothers and ſiſters of *Ann Evat*.

There were five children by this marriage: *Iſabella Gulliſer*: *Ann Vanderzee*: *Mary Evat Smith*: *Robert Evat Aclom*; and *George Aclom*.

In 1772, after the birth of thoſe five children, *Ann Aclom* eloped with *John Greene*; with whom ſhe lived till her death; during which time ſhe had three children: *Alfred Richard*; *Sophia Ann*

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Hobart; and *Horatio Henry*; who were admitted to be illegitimate; her husband never having had acceſs to, or any communication with, her after her elopement (*a*).

By her will, dated the 28th of *April* 1790, reciting the settlement, in purſuance of her power thereby reſerved, and all other powers and authorities enabling her thereunto, ſhe gave and bequeathed the ſum of 10*l.* 10*s.* unto her ſon *Robert Evat* out and being part of the ſaid 2491*l.* 1*s.* 3 *per cent.* Reduced Bank Annuities, ſtanding in the names of the truſtees: and ſhe directed them to pay him the ſame accordingly. The will then proceeded thus:

"He being otherwiſe provided for in and by the laſt will and "teſtament of his uncle, the late *John Goodall*; and as to the "remainder of the ſaid ſum of 2491*l.* 1*s.* 3 *per cent.* Reduced "Bank Annuities, and the intereſt, dividends, and proceeds, "thereon at the time of my deceaſe, I give and bequeath the ſame "unto my children, *Iſabella*, *Ann*, *Mary Evat*, *George*, *Alfred* "*Richard*, *Sophia Ann Hobart*, and *Horatia Henry*, in equal "ſhares and proportions: but if any or either of them my ſaid "younger children ſhall happen to die inteſtate in their minority, "and before he, ſhe, or they, ſhall actually have received or be "paid his, her, or their, ſhare and proportion or ſhares and pro"portions of the ſaid ſum of 2491*l.* 1*s.* 3 *per cent.* Reduced "Bank Annuities, with the intereſt, dividends, and proceeds, "thereon, then it is my will, and I do hereby farther direct and "appoint, that ſuch ſhare or proportion, ſhares or proportions, of "him, her or them, ſo dying inteſtate in his or their minorities, as "ſhall not then have been applied in and towards their education "and ſupport, ſhall go over and be paid to the ſurvivors of them, "other than and beſides my ſaid eldeſt ſon, in and by equal "ſhares and proportions, or to the ſurvivor of them; and if "there ſhall happen to be but one ſuch younger child ſurviving, "then to ſuch only child."

The teſtatrix then directed, that the intereſt and dividends of the ſeveral ſhares ſhould by their guardian be applied to the edu-

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(*a*) In *Pendrell* v. *Pendrell*, 2 *Str.* 925, the old doctrine in favor of legitimacy, if the parents are within the four ſeas, was overruled; and the queſtion of acceſs being left to the jury upon the evidence, the iſſue was found illegimate. The parents had parted three years before the birth of the child: the father going into *Staffordſhire*, the mother ſtaying in *London*.

cation and maintenance of her ſaid younger children during their reſpective minorities; and in caſe of the death of her ſaid now elder ſon *Robert Evat* in her lifetime, and before he comes to the poſſeſſion of the fortune bequeathed him by the ſaid *John Goodall*, and her ſecond ſon *George* ſhould happen to be living, and who will then be entitled thereto, ſhe then gave to her ſaid ſecond ſon *George* the aforeſaid ſum of 10*l.* 10*s.*, ſo given to her elder ſon *Robert Evat*, in lieu of his aforeſaid equal ſhare of the 2491 *l.* 1 *s.* In caſe her now elder ſon *Robert Evat* ſhould ſurvive her, but ſhould happen to die before he comes to the poſſeſſion of the ſaid fortune bequeathed to him by his uncle, and her now ſecond ſon *George* ſhould be then living, ſhe bequeathed and appointed the like ſum of 10*l.* 10*s.* to her ſaid ſecond ſon *George* out of the ſaid 2491*l.* 1*s.* Bank Annuities in lieu of the aforeſaid equal ſhare thereof ſo given and bequeathed him with the reſt of her ſaid children, as aforeſaid; and ſhe directed, that the remainder thereof be equally divided among her ſaid other children, *Iſabella*, *Ann*, *Mary Evat*, *Alfred Richard*, *Sophia Ann*, and *Horatio Henry*, ſhare and ſhare alike; or among ſo many of them as ſhall be living at the time of her deceaſe. She directed, that if any of her ſaid younger children herein before mentioned ſhould conteſt or diſpute the diſtribution of the ſaid 2491 *l.* 1 *s.* Reduced Bank Annuities, or ſhould bring any action, or file a bill for obtaining any other ſhare, proportion, or diſtribution, then he, ſhe, or ſo many of her ſaid younger children, as ſhall conteſt or diſpute the ſaid diſtribution, ſhall forfeit their ſeveral proportions ſo bequeathed them; and in lieu thereof ſhe gave them thereout 10*l.* 10*s.* each only; and ſhe appointed the reſidue of the ſaid Bank Annuities to and among ſuch and each other her ſaid younger children before named as ſhall not conteſt or diſpute the ſaid equal diſtribution; and ſhe appointed *John Greene* guardian of her ſaid children, *Iſabella*, *Ann*, *Mary Evat*, *George*, *Alfred Richard*, *Sophia Ann Hobart*, and *Horatio Henry*, during their minorities, reſpecting their ſhares of the ſaid Bank Annuities, and ſhe appointed him ſole executor.

The teſtatrix died in *Auguſt* 1795; having ſurvived her daughter *Iſabella Gulliſer*; who died in 1792; having attained the age of twenty-one. All the other children of the teſtatrix ſurvived her. The bill was filed by *James Vanderzee* and *Ann*, his

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wife, and *Richard* [illegible] and *Mary* [illegible], his wife; praying, that defendants may ſet forth their claims; and that the rights of the plaintiffs may be aſcertained.

The defendant *George Aclom* inſiſted, that his ſhare ought to be transferred to him abſolutely, not ſubject to the contingencies in the will; that the teſtatrix had no power to impoſe them; and that there is a very remote poſſibility of his coming into poſſeſſion of the eſtate of his uncle; as it is limited to his father for life; remainder to *Robert Evan Aclom* and the heirs of his body, before it is limited to *George Aclom*; and the two former are living.

Upon the general queſtion, whether this power of appointment was well executed, ſeveral points aroſe: firſt, whether the appointment in favor of the illegitimate children was not void;

Secondly, As to the ſhare of *Iſabella Gullifer*; her huſband and adminiſtrator claiming that under the appointment as a veſted intereſt in her; and alſo claiming a proportion of ſo much as was not well appointed.

Thirdly, whether the appointment of 10*l.* 10*s.* was illuſory:

Fourthly, whether the appointment in favor of *George Aclom* can be maintained, being a contingent appointment, ſubject to be defeated in the amount at leaſt in caſe of his becoming an eldeſt ſon.

Fifthly, If any part of the fund is unappointed, in what courſe it ſhall go.

Upon the firſt queſtion the Maſter of the Rolls upon the opening ſaid, if any of the objects were not the children of the teſtatrix in point of law, they clearly could not be entitled. It was mere matter of fact.

Mr. Richards and Mr. Grimwood for the plaintiffs.—Upon the ſecond queſtion, *Iſabella Gullifer* having died in the life of her mother, though ſhe had attained the age of twenty-one, did not take any veſted intereſt in any part of the property, either by the appointment or in caſe of no appointment. *Maddiſon* v. *Andrew* (*a*) lays down principles, that not only decide this part of the

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(*a*) 1 *Veſ.* 57.

the caſe, but apply very ſtrongly to other parts. It is there ſtated, that if all the daughters had died in the life of the mother, the repreſentative of none would take. So if one had died before the mother. There is no difference, whether the appointment was to a deceaſed child, or to one, who dies, before the appointment can operate. It is a legatory appointment. The will cannot operate till the death of the teſtatrix. According to the words of the inſtrument this daughter did not attain that character, that would entitle her to take. An intention is to be preſumed, that the object of the appointment ſhall ſurvive the teſtatrix; that ſhe ſhall not be entitled, unleſs ſhe lives to take it. The other conſtruction would defeat the intention by giving a ſhare to a ſtranger. *Jermyn* v. *Fellows* (*a*), *Bird* v. *Lockey* (*b*), *Oke* v. *Heath* (*c*), *The Duke of Marlborough* v. *Lord Godolphin* (*d*), *Southby* v. *Stonehouſe* (*e*).

The third queſtion, whether the appointment of ten guineas is illuſory, is the moſt difficult. It is clear, the mere amount of the ſum will not determine, whether it is illuſory, or not. It muſt be connected with the power and the extent of it. In this caſe no miſbehaviour is alleged: but if a good reaſon of any kind is given, it will be ſufficient to ſupport the appointment excluding in effect one of the objects: *Boyle* v. *The Biſhop of Peterſborough* (*f*). That caſe ſhews, the queſtion muſt always be, whether the appointment is a fraud upon the power. In *Briſtow* v. *Warde* (*g*) the reaſon is ſtated, that a proviſion had been already given upon marriage: it is not ſtated, that that was in execution of the power: but the Lord Chancellor ſays, the anſwer of the Attorney General is full and unanſwerable, that the Court will not ſet it aſide as illuſory, where the ground is that ſtated in the will; that the teſtator had provided theſe children upon marriage with what he thought an adequate ſettlement, conſidering them as provided for, and therefore not within the true meaning children to be provided for out of his power. A good ground is in this caſe ſtated by the teſtatrix; a conſiderable eſtate deviſed to that ſon by his uncle. Whether the advancement is derived *aliunde*, as in this caſe, or from the perſon executing the power, as in *Briſtow* v. *Warde*, out of the teſtator's own private purſe, makes no difference. The

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(*a*) *Fer.* 93. (*b*) 2 *Vern.* 744. (*c*) 1 *Veſ.* 135. (*d*) 2 *Veſ.* 61. (*e*) 2 *Veſ.* 610.
(*f*) *Ante*, vol. 1. 299. (*g*) *Ante*, vol. 2. 336.

ſituation of this ſon is much better than that of the other children. It is not neceſſary, that he ſhould take any thing immediately from his uncle. It is no more neceſſary, that the proviſion ſhould be immediate, than that the appointment ſhould be immediate; and the power of the parent to give a child, who groſsly miſbehaves, what is not ſufficient to maintain him ſhews the principle, that it is not neceſſary to give each child a preſent proviſion, and one, that is ſufficient to maintain him. This appointment to *Robert Evat*, though ſmall, is immediate. In *Briſlow* v. *Warde* the appointment was not in fact in favour of the daughter; though it was ſo conſidered.

The next queſtion is, whether the contingency in the appointment to *George Aclom* makes it bad. The words of the power are as large, or nearly as large, as in any of the caſes; and are ſatisfied by this proviſion; though the time of veſting is poſtponed, till it ſhall be ſeen, whether his elder brother will have the fortune from his uncle.

The only remaining queſtion is, if the three children born after the elopement are not entitled to ſhare, which ſeems pretty clear, how that part, of which the appointment fails, ſhall be diſtributed. It is too late now to contend, that it muſt not go among thoſe children, who would be entitled, in caſe no appointment had been made. The diſtribution muſt be among the four ſurviving children by the marriage; the plaintiffs and the two ſons: *Iſabella*, who died in the life of her mother, not being entitled to any part.

Mr. Finch for the defendant George Aclom concurred with the plaintiffs upon all the points except the fourth. Upon the third point, whether the appointment of the ten guineas to *Robert Evat Aclom* was illuſory, he cited *Burrell* v. *Burrell* (*a*) from the Regiſter's Book; which agrees with the Report. He obſerved upon that caſe, that it is the ſtronger, as the reaſon of the difference made between the children appeared only in the argument and upon the pleadings, and is not aſſigned by the teſtatrix in the will, as it is in *Briſlow* v. *Warde*.

Upon the fourth point—George Aclom is now entitled to his part of this fund; which cannot be locked up under this contingency, giving

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(*a*) *Amb.* 660. Regiſter's Book, 1767. A. 533.

giving him the benefit of the intereſt only. The words "*ſuch* "*parts, ſhares and proportions*," upon which the plaintiffs rely, point to the *quantum* only, not to the intereſt. The expreſſion "*in ſuch manner*" is not contained in this will. The condition might hang over the life of this ſon; and he might never receive the capital, but the intereſt only. He inſiſts upon the illegality of it. It is in effect no appointment. *Alexander* v. *Alexander* (*a*), a leading caſe upon this ſubject, is directly againſt the validity of ſuch an appointment of a reverſionary intereſt. The condition is now become nugatory; for *Robert Evat Aclom* has attained the age of twenty-one; and he and his father may join in a recovery.

Mr. Grant for the defendant Robert Evat Aclom agreed with the plaintiffs and the defendant *George Aclom*, that the illegitimate children could not take; and alſo, that the ſhare appointed to the daughter, who died in her mother's life, was lapſed; obſerving, that the only caſe againſt Lord *Hardwicke*'s opinion upon that was *Burnet* v. *Holgrave* (*b*); which was mentioned to him in *The Duke of Marlborough* v. *Lord Godolphin*; where he diſtinguiſhes it, and doubts it.

Maſter of the Rolls—I have no doubt upon that point; and am very clearly of opinion, that not having ſurvived the will ſhe can take nothing under it.

As to the appointment of ten guineas, I take it, the law has not entered into the conſideration of the *quantum*: but that at law a very ſlight thing would be an execution. Is there any caſe, in which the point againſt an illuſory appointment has been attempted at law?

For the defendant Robert Evat Aclom—In *Swift* v. *Gregſon* (*c*) the point was made in argument: but the deciſion turned upon another point; and in a caſe, ſtated there in a note, it is laid down, that a very ſlight thing would be an execution at law: but in equity this appointment of ten guineas is illuſory; and therefore the whole appointment is bad. Where the power is to diſtribute to and among the children, there is no diſcretion except as to

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(*a*) 2 *Veſ.* 640. (*b*) 1 *Eq. Ca. Ab.* 296. (*c*) 1 *Term Rep. B. R.* 432.

the proportions. The perſons are fixed even at law: but there a literal compliance with the power is ſufficient. The contrary has been eſtabliſhed in equity upon good grounds; that the author of the power means a proviſion for the children: but the *quantum* muſt depend upon the circumſtances. That is the only ſubject of diſcretion; and Equity ſays, that diſcretion muſt be fairly exerciſed. Exceptions to this rule have been admitted upon fair conſiderations. It is admitted in this caſe, that this ſum bears no proportion to the ſhare of the other children: but it is inſiſted, there is a reaſon for the difference; which makes it the exerciſe of a fair diſcretion, and no fraud upon the power. This is a caſe of marriage-articles: but this rule againſt illuſory appointments has prevailed even as among volunteers. Perhaps it is now too late to deny, that there may be a ſufficient reaſon for an unequal diſtribution: *Briſtow* v. *Warde* however may be diſtinguiſhed in this; that the power in that caſe was not ſo imperative as in this. It is not ſaid there, that the diſtribution is to be *among* all the children. There was a very large diſcretion. In *Boyle* v. *The Biſhop of Peterborough* there is nothing more than the general propoſition ſtated by Lord *Thurlow*, that a fair reaſon may be aſſigned. It was perfectly clear there, that the appointment was rational; and the contrary diſpoſition would have defeated the intention of the author of the power. In *Briſtow* v. *Warde* a very ſtrong reaſon was aſſigned for the inequality of the appointment, a marriage-portion given by the perſon making the appointment. That is much ſtronger than a proviſion by a mere ſtranger. It was a purchaſe. The appointment firſt to the huſband for life and after his death to the wife was good upon the ground, that it was a legal appointment to the wife herſelf; and it is ſo put by the Lord Chancellor. Theſe caſes have not gone beyond this; that, where a child is already actually provided for, the Court will juſtify the perſon appointing in taking that into conſideration. But the Court will never permit a falſe reaſon to juſtify an illuſory appointment. This ſon is deſtitute of any preſent proviſion. It is not ſufficient to ſay, that in certain events he will be provided for. The only proviſion, to which the teſtatrix refers, is a remainder in tail in a real eſtate after an eſtate for life in his father; who may ſurvive his ſon. They may join in a recovery; and the father may let him into poſſeſſion now: but that is quite uncertain.

Mr. Cox for the defendant Gulliſer, claiming as adminiſtrator of his deceaſed wife—Firſt, this defendant claims the intereſt appointed to his wife; ſecondly, if he cannot claim under the appointment, he inſiſts, that for that among other reaſons the appointment cannot be maintained at all: thirdly, at all events he is entitled to a ſhare of what is unappointed; whether the appointment fails in the whole, or as to part.

It is material to conſider, whether the execution of the power operates to deveſt or to create eſtates or intereſts. That diſtinction, taken by the Lord Chancellor (*a*) in *Smith* v. *Lord Camelford*, runs through moſt of the caſes. What is there ſtated applies to this caſe, only ſubſtituting the executors of the deceaſed child for the children of the deceaſed child; for I contend, the executors muſt take the part unappointed. But by the final deciſion of that caſe and upon *Cunningham* v. *Moody* (*b*) and *Doe* v. *Martin* (*c*) it is now clearly ſettled, that each child has a veſted intereſt in the fund, ſubject only to be deveſted by the exerciſe of the power. In this caſe the deveſting is confined entirely to the *quantum*, that each child is to take. This is a proviſion for all the children; who are conſidered as purchaſers, ſubject to the power of appointment only as to the *quantum*. It muſt be conſidered ſtrictly with reſpect to the words of the ſettlement. The perſons, among whom the teſtatrix has the power to appoint, are preciſely the perſons, to whom the fund goes in default of appointment; that is, all the children. There is nothing to confine it to children living at the death of their mother. The only thing, that can be conſidered as looking that way, is the direction to the truſtees to pay within one year after her deceaſe. That makes no difference as to the veſting. The time of payment only is poſtponed. It is the common caſe of *debitum in præſenti ſolvendum in futuro*. In *Exel* v. *Wallace* (*d*) it might alſo have been contended, that ſuch only of the objects of the power ſhould take, who lived to be able to receive it and to give a diſcharge: but the Maſter of the Rolls contradicts that. That caſe afforded a much ſtronger ground for the argument. In *Wilſon* v. *Piggott* (*e*) it might have been ſaid, the objects muſt live to the time, at which the diviſion is to take place. The argument might ariſe as well

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(*a*) *Ante*, vol. 2. 703. (*b*) 1 *Veſ.* 174. (*c*) 4 *Term Rep. B. R.* 39.
(*d*) 2 *Veſ.* 117; 318. (*e*) *Ante*, vol. 2. 351.

in every caſe of appointment. Then what is the effect of the appointment upon theſe veſted intereſts? The event, that might exclude *Iſabella* or her repreſentative from the ſhare appointed to her, has not happened; for ſhe lived to attain the age of twenty-one. It muſt be contended, that "*and*" muſt be conſtrued "*or.*" I admit that has been done (*a*) to fulfil the intention. There is nothing inconſiſtent in ſuppoſing, ſhe intended, that if a child lived to the age of twenty-one, the intereſt ſhould be veſted, notwithſtanding the death of that child before actual receipt. None of the caſes cited apply; for in all of them the children have been conſidered as taking only under the appointment, not as having any veſted intereſt in default of appointment, as in this caſe. The appointments in thoſe caſes were appointments creating eſtates, not deveſting eſtates before created. That circumſtance has made a great impreſſion upon the Court. In *Maddiſon* v. *Andrew* that circumſtance is expreſsly excluded. The intereſt there might have been very fairly conſidered as in the nature of a legacy. Nothing was to ariſe but under the gift of the mother. Here that is not the caſe. They take entirely under the ſettlement; and the only power is to determine the ſhares. *Oke* v. *Heath* differs ſtill wider from this caſe. The perſons to take in default of appointment were not neceſſarily the ſame perſons, who might have been the objects of the power, if exerciſed. The power was to appoint to all or any. No one could claim till the execution or the extinction of the power; and the teſtatrix might have excluded whom ſhe pleaſed. So in *The Duke of Marlborough* v. *Lord Godolphin* the intereſt was in the nature of a legacy: nothing veſting, except under the exerciſe of the power. *Boyle* v. *the Biſhop of Peterborough* does not bear much upon this caſe. Lord *Thurlow* reſts much upon the direction, that the intereſts ſhall be veſted in the ſons at the age of twenty-one. The purpoſe of the diſtribution was at an end: but ſtill Lord *Thurlow* thought, the mother had the power of ſaying, it ſhould not go over as in default of appointment.

Then, if the ſhare appointed to *Iſabella* is lapſed, the next conſideration is, how far can the appointment ſtand at all. The mother being bound to give each child ſomething, it cannot ſtand.

(*a*) See *Maberly* v. *Strode, ante,* vol. 3. 450; and the authorities there referred to.

Under the words of this power ſhe could not exclude any one. The objects of appointment are preciſely thoſe, who are to take in default of appointment; and it muſt fall within the words of the ſettlement, or it is good for nothing; being derived out of the ſettlement. In *Menzey* v. *Walker* (*a*) the execution of the power was void for that reaſon. In *Wilſon* v. *Piggott* the point was in ſome degree diſcuſſed. The Court ſaid, it might be at different times; and, till the whole was appointed, one child was not excluded. It was doubted, whether not being bad at firſt it might be ſo afterwards: but all, that was there determined, was, that the appointment might be by different inſtruments; and that, as it was not bad at firſt, it was difficult to argue, that it could be ſo afterwards. But this teſtatrix profeſſes to make by one inſtrument all the appointment intended. In *Bird* v. *Lockey* the ſame reaſon occurs; that the children had no veſted intereſt, but were to take ſolely under the appointment. That is the material diſtinction between all the other caſes and this. In *Congreve* v. *Congreve* (*b*) and all thoſe caſes each child under the marriage articles took a veſted intereſt upon coming *in eſſe*; and that is not altered by death before the time of diſtribution.

Maſter of the Rolls—This caſe has been extremely well argued by Mr. *Cox*, for the repreſentative of *Iſabella Gullifer*: but as to the ſhare appointed ſhe certainly muſt claim as a purchaſer under her mother; and ſhe cannot take as a purchaſer under the will. I have no difficulty upon that point; and therefore ſhall relieve the Counſel in reply from that.

Mr. Richards in reply—There is no queſtion, that there muſt be a reference to the ſettlement; and upon the words of that inſtrument a child dying in the life of the mother cannot take either by appointment or in default of appointment: not by appointment; becauſe no appointment could be made but by will. If the teſtatrix had appointed the whole to the children, who ſhould be living at her death, that would have been good; and the repreſentatives of the deceaſed child could not have claimed; for the very eſſence of an appointment by will is, that thoſe to take ſhall be living at the death of the perſon appointing. If ſhe could not appoint to the ſurvivors on account of the death of one in her life, that would

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(*a*) For. 72. (*b*) 1 Bro. C. C. 531.

defeat the power, becauſe the veſted intereſt could not be deveſted by the death. If the appointment to the ſurvivors would have anſwered the exigencies of the power, as it muſt, becauſe it was to be executed by will, thoſe to take in default of appointment muſt be the ſurvivors. The propoſitions are convertible. In *Maddiſon* v. *Andrew* the intention of the teſtator was, that each daughter ſhould have ſomething: yet nothing veſted; and none took, except thoſe, who ſurvived. The bequeſt there was not to the children immediately, but to the mother, to be by her diſpoſed of, *&c.* but in *Oke* v. *Heath* it is for ſuch of her kin as ſhe ſhall appoint. *Bird* v. *Lockey* alſo is an immediate bequeſt. There can be no difference. Several parts of Lord *Thurlow*'s judgment in *Boyle* v. *The Biſhop of Peterborough* are material upon this point. As *Iſabella* was not capable of taking under the execution of the power, ſhe cannot take in the event of the non-execution under the articles. Upon the conſtruction of the inſtrument the intereſt does not veſt at the birth.

Then as to the appointment ſaid to be illuſory. It is not ſo; though, I admit, it bears no proportion to the other ſums. If any thing is appointed to each, it ſatisfies the law; and if the law is ſatisfied, a Court of Equity will not diſturb it, unleſs impeached for fraud. Exceptions have been admitted. The parent may be unreaſonable, cruel, and unjuſt. The child may be right in the marriage. The Court muſt either ſay, the parent has a right to commit what under other circumſtances would be a fraud upon the daughter, merely becauſe ſhe married againſt his conſent, or muſt make further inquiry. Lord *Hardwicke* had particular notions upon the ſubject of marriage, as to which many wiſe men diſſented from him. The real foundation of it is what is ſaid in *Maddiſon* v. *Andrew;* that the power is in the nature of a diſtreſs; and if there is miſbehaviour in the eyes of the parent, that is a ſufficient reaſon for partiality. The *quantum* of the proviſion therefore is not the object to be attended to; particularly where, as in that caſe, the fund is not adequate to a proviſion for all. If the diſcretion is fairly exerciſed, without groſs partiality, it is ſufficient. *Boyle* v. *The Biſhop of Peterborough* proves, that fraud muſt be the ground. *Briſtow* v. *Warde* contains the ſame doctrine. If proviſion is the object, it muſt be always greatly broken in upon. In the caſes of compelling a ſurrender of copyhold eſtate in favour of a wife or younger children, the Court will not enter into the queſtion as to the *quantum* of the proviſion: but the heir, if not totally unprovided for, ſhall be compelled to make the ſurrender (*a*). No rule of law is broken down in that caſe. The father is the ſole judge, and in general the only good judge. How can the Court judge of the propriety of the proviſion he has made? The child may miſbehave in ſuch a manner, that the father cannot produce it in a Court of Juſtice. There are many ways by a courſe of diſobedience and ſullenneſs of teazing and ill-treating the father, which he cannot produce in evidence. This child is provided for; though he has not a preſent proviſion. It is a future intereſt; but what is given now is immediate; and ſatisfies the power in point of law; and the only principle, upon which this Court can interfere, is, that the father has committed a fraud upon the power, unjuſtly preventing a fair proportion from going to the particular child. In the caſe in *Foreſter* that ground is taken. No fraud is intended upon this child. That there is no partiality, appears from the ſame proviſion being made for the ſecond ſon in the event of the death of his brother. *Burrell* v. *Burrell* is very ſtrong: the proviſion appearing only in evidence; and not being aſſigned as the reaſon. This appointment ſtates, that there is a proviſion, though not a preſent one. Muſt we debate, whether a preſent proviſion is neceſſary? All the circumſtances of the family muſt be taken into conſideration, before the Court can ſay, it is a fraud upon the power. *An appointment of 200*l.*, which would have been a fair proportion, would not have been any thing like a proviſion. This ſon is in a much better ſituation than his brother. His remainder is a veſted intereſt; and if it was a remainder in fee, it would be a preſent proviſion. Suppoſe, the father had died before the mother, and this ſon at the time of the appointment had a preſent proviſion; or ſuppoſe, the father had died the day after the mother: it would be too much to ſay, the appointment was illuſory. It is argued, that in *Briſtow* v. *Warde* the father became a purchaſer: but it is perfectly immaterial, from whom the proviſion comes. The queſtion cannot depend upon that, but upon the general circumſtances; for the parent by giving a portion

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(*a*) See the authorities referred to by Mr. *Cox*, 1 *P. Wms.* 60. Upon that queſtion there is no difference, whether the proviſion is derived from the teſtator, or *aliunde*: nor is it any objection, that a younger child will be in a better condition than an elder: *Chapman* v. *Gibſon*; *Pike* v. *White*; 3 *Bro. C. C.* 229; 286.

does not buy the right of that child to the ſhare unappointed.

Upon the remaining queſtion, *George Aclom* is not now entitled to the ſhare appointed to him. According to *Alexander* v. *Alexander* the teſtatrix might give a ſhare to one for life, and after his death to the other children, if the words are large enough; and the words "in ſuch parts, ſhares, and proportions," are ſufficient; and "for ſuch eſtates and intereſts" are implied. There can be no queſtion, that it is reaſonable, if it can be done. The teſtatrix appoints to one as a younger ſon; and, if he becomes the eldeſt ſon, ſhe impoſes upon him the condition, which in *Chadwick* v. *Doleman* (a) the nature of the thing impoſed. If ſhe had known ſhe could not have done this, ſhe would not have given this ſon an equal ſhare.

July 17, 1799.

Maſter of the Rolls—In this cauſe I am of opinion, the whole appointment is void; and therefore the fund is diſtributable among all the children, including the eldeſt ſon as well as the reſt; and that there was a veſted intereſt in all the children at their reſpective births; and it is not to be confined, as was ſtrongly contended, to ſuch as were living at the death of their mother.

This cauſe has ſtood for judgment a great while; and it is one of thoſe caſes, that have involved the queſtion as to the due execution of a power of appointment; and whether the diſpoſition made is or is not within the power; or whether part of the ſubject being appointed to one of the objects is ſo inſignificant as to be conſidered in this Court illuſory. There is no queſtion, that has cauſed more doubt and difficulty in the mind of every Judge, who has ſat in this Court, than that. To me it has occaſioned greater difficulty than any other queſtion. It is now perfectly eſtabliſhed, that, wherever a power is given to appoint to and among ſeveral perſons, the power is not well executed, unleſs ſome part is allotted to each. That certainly is the legal effect of ſuch a power; and if an appointment takes place without allotting ſome ſhare to each of the objects, the whole is abſolutely void. That is the rule of law. But if any part is allotted to each, a Court of Law will not enter into the queſtion as to the adequacy or ſufficiency; but will hold it good. Unfortunately that does not ſatisfy this Court: but Courts of Equity, perhaps for good reaſons at the time, though from the difficulty, that has followed, one cannot but lament the rule, have held, that it is not ſufficient, that there ſhould be a legal execution of the power by giving a part to each; but it muſt be a part, that is a ſubſtantial gift, not for the mere purpoſe of complying with what the law requires, intending to exclude the object from any real, ſubſtantial, beneficial, intereſt. This rule now has long prevailed; and it muſt be admitted to be the Rule of a Court of Equity, that there ſhall be a *bonâ fide*, ſubſtantial, beneficial, appointment to make it good in equity; as ſome part is required to make it good at law. The difficulty is to determine, what ſhall be a ſufficient part. I rather wiſh to ſuppoſe theſe queſtions determined upon the ground of fraud upon the intention of the perſon creating the power; and therefore that the *quantum* cannot in all caſes be ſaid to be ſufficient to determine, whether the appointment is illuſory or not. A gift of a ſum bearing the ſame proportion to the capital may in one caſe be illuſory, in another, not. An appointment of 10 *l.* may in one caſe be ſufficient, in another, illuſory; and generally it is ſo, unleſs there are particular circumſtances to juſtify the diſproportion. Therefore it is not the ſmallneſs of the ſum, that can in all events demonſtrate it to be illuſory; for if, as in *Briſtow* v. *Warde*, the perſon executing the power has himſelf provided for an object of the appointment, as if it is to be executed for children, and the party executing it has already provided for ſome, ſo as to make it injuſtice to the others, that they ſhould come in equally, a very ſmall ſhare to thoſe, who are ſo provided for, would not be illuſory. Another caſe may ariſe, where there is an actual proviſion made for ſome, even where it does not move from the perſon executing the power. The power of diſtribution is given, in order that there may be an inequality, if neceſſary. It is therefore nothing but a truſt in the party to diſcriminate, how much each ought to have under every circumſtance, that ought fairly to enter into his conſideration, and with a view of the object of the power that each of them ſhould receive a proviſion. If that is ſatisfied *aliunde*, it has had its object. But this has left the Court in a great dilemma in deciding under all the circumſtances, whether the proviſion is ſufficient. It is clearly determined,

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(a) 2 *Vern.* 528.

Under a power to appoint to and among ſeveral perſons each of the objects muſt have a part; but a Court of Law will not enter into the amount of the ſhare appointed.

In Equity an appointment of a very ſmall ſhare is not illuſory, if juſtified by circumſtances; as where that object is otherwiſe provided for.

determined, that there muſt be ſome proviſion for each child, either by the appointment, or by ſomething elſe; and if one is not at all provided for, that one cannot be left without ſome ſhare out of the intended proviſion. There is no caſe, in which there really has been no proviſion at all for one of the clear objects; who muſt either have a ſhare, or a proviſion by ſome other means. That caſe now comes before the Court upon this bill; the ſubject of which is a proviſion to be made under the power contained in theſe marriage articles out of the wife's fortune, not the huſband's, for each child, including the eldeſt as well as the youngeſt. Upon the facts, that have happened, it is very clear, the illegitimate children are not objects of the appointment; and as to any ſhare given to them it is void. Perhaps that would not make the whole void, and that part would be undiſpoſed of. But that point will not ariſe; for, if they were to be conſidered as her children, I am of opinion, the appointment is void for another reaſon. The eldeſt ſon *Robert Evat Aclom*, being entitled under the will of his uncle to an eſtate tail in remainder after an eſtate for life in his father, the teſtatrix meaning to do right gives that reaſon for paſſing him over in effect; and ſhe gives him ten guineas; becauſe he was provided for. The fact is, he has no proviſion at all, no ſettlement either from his father or mother. Upon that ground I am of opinion, however deſirous I am of executing the intention, that ſhe has not well executed her power; admitting, that a good reaſon might juſtify her in giving him ten guineas only; Mr. *Grant* admitted, that it is in a great meaſure a queſtion of fraud; and that poſſibly, if the child is otherwiſe provided for, it might in the mind of the parent according to ſome determinations, and particularly what Lord *Thurlow* threw out in one caſe, be a ſufficient reaſon. But an appointment of ten guineas out of this fund and under theſe circumſtances is not ſufficient.

Another queſtion, which is at an end by my opinion upon this caſe, aroſe upon the appointment to *Iſabella*; who died in the life of her mother. It was ſtrongly contended, (and it was very well argued) that the appointment could not operate for that ſhare, and that it lapſed. I am of that opinion: but I need not go into the point; being of opinion, that the appointment is wholly void; and the fund is totally unappointed.

It was then ſtrongly contended, that this ſettlement creating the power gave no veſted intereſt; that in default of appointment the diſtribution muſt be among ſuch children only as were living at the death of their mother; and that *Iſabella* having died in the life of her mother could not be entitled to a ſhare for want of appointment. It is clear from the nature of the power and the words, that there was a veſted intereſt in all the children. I really cannot conceive, upon what ground it was contended to be diviſible among the children living at the death of their mother. For want of appointment it is to go to all and every the child and children; and it is to go over for want of ſuch iſſue; that is, children. To confine it to children living at the death of the mother is an impoſſible conſtruction. It is a veſted intereſt in all the children ſhe might ever have upon their reſpective births, to be deveſted by the exerciſe of the power of appointment.

I deſire to be underſtod, that the ground, upon which I decide this caſe, is not, that the appointment of ten guineas to one of the objects would alone, if he was a child otherwiſe provided for, make it void: but when I ſee a power to diſtribute among all the children, intending to take in the eldeſt as well as the reſt, in a marriage ſettlement, and that power exerciſed, and an appointment of ten guineas to one, evidently intended to be a gift of nothing ſubſtantially, becauſe that one was otherwiſe provided for, when I ſee he has no proviſion whatſoever, it is impoſſible to hold, that he is to live without any proviſion from this fund, having none otherwiſe. Therefore, though I wiſh to ſupport the execution of a power, where it has been exerciſed *bonâ fide*, I muſt declare this appointment invalid and void; and that the ſeveral funds compriſed in the marrige ſettlement are diſtributable among all the children of *George Aclom* and *Ann* his wife and the repreſentatives of ſuch as are dead.

As to the children born after the ſeparation, I cannot declare them illegitimate. There muſt be an inquiry as to that.

The inquiry was waived: the fact being admitted.

1799.

Rolls,
Feb 22. 24.
1797.
July 17,
1799.

A deed is conſtrued more ſtrictly than a will according to the legal import of the words. Therefore in a marriage ſettlement after life eſtates to the huſband and wife a remainder to the heir male of her body by him to be begotten and to his heirs and for want of ſuch to the daughters, and, if there ſhould be no iſſue of the marriage, to the right heirs of the huſband, was held a contingent remainder in fee in ſuch perſon as ſhould be heir male of the wife at her death.

BAYLEY *v.* MORRIS.

BY indentures of leaſe and releaſe, dated the 29th and 30th of *November* 1744, previous to and in conſideration of the marriage of *Philip Holper* and *Elizabeth Tomkins*, a ſum of 800 *l.* was directed to be laid out in land, to be ſettled to and for the only proper uſe and behalf of *Philip Holper* and his aſſigns during the term of his natural life; and after his deceaſe to the uſe of *Elizabeth*, his intended wife, during the term of her natural life; and after her deceaſe then upon truſt, that ſuch whole monies or the lands to be purchaſed ſhall be to the uſe and behoof of the heir male of the body of the ſaid *Elizabeth* begotten by the ſaid *Philip Holper*, and to the heirs or executors of ſuch heir male; and for want of ſuch iſſue to the uſe and behoof of all and every the daughter or daughters begotten by the ſaid *Philip Holper* upon the body of the ſaid *Elizabeth*, equally to and among them, and to their heirs or executors, and if but one, to that daughter only and her heirs and executors; and in caſe of no iſſue of the ſaid intended marriage, then to the uſe and behoof of the heirs, executors, or adminiſtrators, of the ſaid *Philip Holper*, or ſuch perſon or perſons, as he ſhall by his will appoint.

By the ſame indentures a houſe in *Leominſter* with certain lands and hereditaments, of which *Philip Holper* was ſeiſed in fee, were conveyed to *Snead Davis* and *George Wanklin*, their heirs and aſſigns; and the uſes and truſts were declared in the following manner:

“ To and for the only proper uſe and behoof of the ſaid *Snead*
“ *Davis* and *George Wanklin* and their heirs and aſſigns for ever,
“ in truſt only, and to and for the ſeveral uſes, intents and pur-
“ poſes, hereinafter mentioned: (that is to ſay) in truſt for the
“ ſaid *Philip Holper*, his heirs and aſſigns, until the ſolemniza-
“ tion of the ſaid marriage; and from and after the conſummation
“ of the ſame then to and for the only proper uſe and behalf of
“ the ſaid *Philip Holper* and his aſſigns for and during the term
“ of his natural life, and from and after his deceaſe then to the
“ uſe and behoof of the ſaid *Elizabeth*, his intended wife, and her
“ aſſigns for and during the term of her natural life; and from

“ and after the ſeveral deceaſes of them, the ſaid *Philip Holper* and “ *Elizabeth*, his wife, and the ſurvivor of them, then to the uſe “ and behoof of the heir male of the body of the ſaid *Elizabeth* “ by the ſaid *Philip Holper* lawfully to be begotten and to his “ heirs; and for want of ſuch then to the uſe and behoof of all “ and every the daughter and daughters begotten by the ſaid “ *Philip Holper* on the body of the ſaid *Elizabeth* equally to and “ among them and their heirs; and if but one daughter, then the “ whole to ſuch daughter and her heirs;” and if there ſhould be no iſſue of the marriage, then to the uſe of the right heirs of *Philip Holper*.

The iſſue of this marriage was one ſon, *Thomas Holper*, and three daughters, *Ann Dovaſton*, *Jane Brace*, and *Mary Dovaſton*; *Thomas Holper* in 1779 after the death of his father, having obtained from his mother a ſurrender of her life-eſtate, mortgaged the houſe in *Leominſter* and a farm, part of the ſettled eſtates, to *William Hare*; and the plaintiff on the 1ſt of *May* following took an aſſignment of that mortgage, to protect other demands, for which *Holper* had ſigned an agreeement, dated the 30th of *April*, to charge the premiſes by way of mortgage; and he had delivered the title deeds to the plaintiff. The plaintiff had recovered the farm by ejectment: but the houſe was in the poſſeſſion of the ſiſters of *Thomas Holper* and their huſbands. In 1779 the plaintiff brought an ejectment for the houſe; and was nonſuited. In 1789, *Thomas Holper* being dead without iſſue, having never been married, and leaving his three ſiſters co-heireſſes at law, the bill was filed againſt the widow of *Philip Holper*, her three daughters with their huſbands, *Morris*, claiming under indentures of mortgage, dated the 15th of *March* 1779, and other perſons; praying a foreclоſure; and that, if the indentures, under which the defendant *Morris* claimed, were in fact executed on the day, on which they appear to bear date, then that the plaintiff may be permitted to redeem.

The defence ſet up by the anſwers was, that, as the ſettlement was made for *bonâ fide* conſideration, and all the iſſue of the marriage were equally objects of ſuch proviſion, and the legal eſtate being executed in the truſtees, *Thomas Holper* had only an equitable eſtate; and, if he took an eſtate tail, not having done any act to bar it, the daughters are entitled. They ſtated, that the defendant *Elizabeth Holper* conveyed the premiſes to her ſon merely to qualify

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qualify him to vote: but the conveyance was not intended to have any other effect; and he agreed both verbally and in writing, that ſhe ſhould have the poſſeſſion, and a leaſe of the premiſes for life; and the deeds of conveyance were delivered to *Jane Brace;* who delivered them back to her mother; and they were locked up in a bureau: but *Thomas Holper* broke open the bureau; and took them out without her knowledge. The defendant *Elizabeth Holper* by her anſwer ſtated, that ſeveral ejectments had been brought by the plaintiff and abandoned.

By the decree made at the *Rolls* on the 14th of *July* 1795 the bill was retained for twelve months, with liberty to bring an ejectment: the defendants being reſtrained from ſetting up any other defence than the ſettlement and the mortgage to *Morris*, purporting to bear date on the 15th of *March* 1779. The ejectment came on to be tried before Baron *Thompſon* at the aſſizes at *Hereford* on the 17th of *March* 1796; when it was ſuggeſted for the defendant, that the premiſes were veſted in the truſtees in the ſettlement, and not in the plaintiff as mortgagee; upon which the plaintiff was nonſuited. A petition was preſented by the plaintiff, praying, that the nonſuit might be ſet aſide, and that he might be at liberty to proceed to a new trial. Upon that petition on the 11th of *March* 1796 a Caſe was directed for the opinion of the Court of *King's Bench* upon the queſtion, what eſtate and intereſt *Thomas Holper* deceaſed, the mortgagor, took in the premiſes, ſituate at *Leominſter*, under the indentures of ſettlement, dated the 29th and 30th of *November* 1744. The caſe came on to be argued in the Court of *King's Bench* on the 10th of *June;* when that Court declined giving any opinion. Under theſe circumſtances the cauſe was again ſet down at the *Rolls*, and the queſtions made were, firſt, whether *Thomas Holper* took a veſted eſtate under the deſcription of heir male:

Secondly, if he did, whether he took an eſtate tail or an eſtate in fee.

Mr. Graham and Mr. Shuter for the plaintiff—Lord *Coke*'s Comment on the 22d and 23d ſections of *Littleton* will probably be relied on; where it is laid down, that if there is a leaſe for life to *A.* with remainder to the heirs female of the body of *A.*, who dies, leaving a ſon and a daughter, the daughter not being heir general cannot take. That doctrine received conſiderable countenance in *Counder* v. *Clarke* and ſome ſubſequent caſes: but that law has of late been much quarrelled with; and it has been conſidered as a ſtrange and harſh rule; for though it is generally true, that *nemo eſt hæres viventis*, yet in common acceptation the word as frequently means the heir apparent as the actual heir at the death of the anceſtor; and though, when the *Statute de donis* (*a*) has received the proper conſtruction, that a perſon under the deſcription of heir male or female, though not heir general, might take by deſcent, the diſtinction is unreaſonable, yet it is laid down by Lord *Coke*, that in the caſe of a purchaſe it would not do. In a great variety of caſes upon wills that diſtinction has not been adhered to; but the contrary doctrine has been held: *Archer's caſe* (*b*), *Beaumont* v. *Long* (*c*), *Harris* v. *Barnes* (*d*) and many other caſes, which are all collected by Mr. *Fearne*. The doctrine is very much diſcuſſed by Mr. *Hargrave* (*e*). I am not aware of any inſtance, in which the ſame latitude has been allowed to the intention in the caſe of a deed: but upon the principles, upon which deeds are now conſtrued, it would prevail even in the caſe of a deed, if the intention is clear to ſingle out that perſon. But we are not driven to the neceſſity of contending to that extent; for the words of this deed clearly mark the intention: the limitation being to "the heir "male of the body of the ſaid *Elizabeth* by the ſaid *Philip Holper* "lawfully to be begotten;" not merely to the heir of her body. The moment there was a ſon, no other perſon could be intended. He was clearly the heir pointed out. Though the wife ſurvived, no other perſon could be that ſpecial heir. The identity of perſon is ſufficiently marked; and there can be no doubt of the intention, that if there ſhould be a ſpecial heir of their two bodies, a perſon anſwering that deſcription in the popular ſenſe, that was the perſon to take; and in that caſe there could not be the default, upon which the limitation over was to take place. Upon the other conſtruction, that the perſon to take muſt be heir male at the death of the wife, what would be the ſituation of the eldeſt ſon? He could make no jointure, no proviſion for children. He might live to an advanced age without any certain proviſion. The Court muſt conſider, with what view ſuch a deed was made. The truſt as to the 800*l.* is certainly different from that of the land. They

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(*a*) *Weſtm.* 2. 13 *Edw.* 1.

(*b*) 1 *Co.* 66.

(*c*) *Darbiſon on the demiſe of Long* v. *Beaumont*, 1 *P. Wms.* 229.

(*d*) 4 *Burr.* 2157.

(*e*) *Co. Lit.* 24. *b.* note 145.

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intended as much as poſſible to avoid tying up the eſtate either in tail general or ſpecial; for the ſubſequent limitation is to the daughters in fee. *Madoc* v. *Jackſon* (*a*), though upon leaſehold property, applies to this caſe as to veſting.

The Maſter of the Rolls ſtopped the Counſel for the plaintiff upon the ſecond point; declaring, that, he was clearly of opinion, until he ſhould hear the other ſide, that *Thomas Holper* would have been tenant in fee-ſimple; and it was impoſſible under ſuch words in a deed to make him tenant in tail.

Mr. Lloyd and Mr. Stanley for the defendants—With reſpect to that point this is a deed certainly very ill drawn. The limitations are meant to be extended through all the iſſue of the marriage. The intention as to the 800*l.* and as to the houſe in *Leominſter* are the ſame. With reſpect to the former, being an executory truſt, the Court would have conſtrued it a ſtrict ſettlement. The inintention could not be to give it to a ſon unborn in fee. Suppoſe, it veſted in the eldeſt ſon; and he had died, leaving a daughter: a ſecond ſon could not have taken any thing. Could that be the intention? It was to go to the daughters in the events mentioned in the ſettlement. It is clear, the reverſion in fee is not to take effect, if there is any iſſue whatever. The words "*for want of* "*ſuch*" mean for want of iſſue of the body of the heir male. The intention to give this to the eldeſt ſon and his heirs is unnatural. If this inſtrument was a will, it muſt have been held an eſtate tail; becauſe during the lives of his ſiſters he could not have died without an heir; *Tyte* v. *Willis* (*b*), *Tilburgh* v. *Barbut* (*c*); and there is no difference between a will and a deed, if the intention is clear. If the Court is ſatisfied as to that, there is no rule to prevent theſe words from raiſing an eſtate tail in a deed as in a will. In *Bereſford's caſe* (*d*) the rules as to conſtruing deeds are laid down. *Leigh* v. *Brace* (*e*), *Beck's caſe* (*f*). Even in Lord *Coke*'s time many words made an eſtate tail beſides "*heirs of the body*."

As to firſt point, there is no doubt, that this is a remainder; the anceſtor taking an eſtate for life. At what time did this remainder veſt in *Thomas Holper*? It could not veſt upon his birth; for he could

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(*a*) 2 *Bro. C. C.* 588. It has been more than once obſerved, at the bar, that this caſe turned upon a point wholly collateral, though there was ſome diſcuſſion upon that, which is the ſubject of the Report.

(*b*) *For.* 1.

(*c*) 1 *Veſ.* 89. 3 *Atk.* 617.

(*d*) 7 *Co.* 41.

(*e*) *Carth.* 343. 5 *Mod.* 266. 1 *Ld. Raym.* 101. *Fearne's Con. Rem.* 514.

(*f*) *Litt. Rep.* 344.

not anſwer the deſcription of heir male during the life of his father. In *Beaumont* v. *Long*, *Newcoman* v. *Barkham* (*a*) and all thoſe caſes, the deſcription marked the perſon as preciſely, as if a living perſon had been named. In this deed there is a particular deſcription; and the general deſcription "*heir male*" muſt be referred to the death of the executor. *Thomas Holper* not anſwering the deſcription at that time took no intereſt whatever. *Madoc* v. *Jackſon*, which is not correctly reported, does not apply.

The Maſter of the Rolls deſired the plaintiff's Counſel to confine his reply to the firſt point.

Mr. Graham in reply—This is a limitation to the heir apparent; and the words are equivalent to a limitation to the firſt and other ſons; and it was a veſted intereſt at the birth of the firſt ſon. There are many exceptions to the rule that *nemo eſt hæres viventis*; becauſe the word "*heir*" in the vulgar acceptation is commonly applied to the heir apparent; and this conſtruction holds even upon a deed. In *Jone* v. *Morgan* (*b*) Lord *Thurlow* lays down the rule, that in all caſes, where a party takes in the character of heir, he muſt take in the quality of heir, that is, by deſcent. That caſe has ſubverted the authority of *Bagſhaw* v. *Spencer* (*c*), and eſtabliſhed, that there can be no different conſtruction upon a truſt executed. If the Court rejects the idea of *deſcriptio perſonæ*, and conſiders this limitation as ambulatory till the death, then it muſt be held, that the wife had an eſtate tail; which is going beyond the defendant's argument, and would certainly defeat the intention of the ſettlement; which is, that ſhe ſhould have only an eſtate for life.

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Maſter of the Rolls—This is a legal queſtion: but I am deſired on account of the ſmall value to give my opinion. It has not been formed without due deliberation; as I feel, that there is ſome little difficulty in the caſe. The premiſes were conveyed to truſtees; and the words appeared to me to convey a legal eſtate for life; upon which I ordered an ejectment to be brought. At the trial they thought it was a point to be ſtarted, that, the legal eſtate was in truſtees; upon which the plaintiff was non-ſuited.

(*a*) *Amb.* 8. by the name of *Newcoman* v. *Bethlem Hoſpital* and in Mr. *Hargrave's* note 145 *Co. Litt.* 24 *b. Brown* v. *Barkham*.

(*b*) 1 *Bro. C. C.* 206.

(*c*) 1 *Veſ.* 142. 2 *Atk.* 246; 570; 577.

Upon a petition to me I made them pay the coſts of that nonſuit; and then I directed a caſe for the opinion of the Court of *King's Bench.* Upon the ſame ground that Court would not give an opinion.

It is to be obſerved, that this is the caſe of a deed, not of a will; and the queſtion is, what is the legal effect of theſe words in a deed. It was contended, that if *Thomas Holper*, the ſon, took any eſtate, it was an eſtate tail; and no recovery having been ſuffered, the daughters are entitled: alſo, that he had no eſtate during the life of his mother, but a contingent remainder upon her death. I will not decide, what would have been the conſtruction of ſuch words, if they had occurred in a will. The words "*heir* "*male*" may be *nomen collectivum:* but in a deed ſuch a conſtruction cannot obtain. This muſt be held as *deſignatio perſonæ* of the perſon, who ſhould be heir male of the wife at the time of her death; and the true conſtruction is, that it is an eſtate in fee to the perſon anſwering that deſcription. *Loddington* v. *Kime* (*a*) and *Clerk*, or *Cheek*, v. *Day* (*b*) were relied upon in the Court of *King's Bench;* where they did go ſome way into the argument. The conſtruction upon words of this ſort in a will, to effectuate the general intention to include all the iſſue, is perfectly eſtabliſhed: but there is no inſtance of the Court's conſtruing words contrary to their legal import in ſo ſolemn an inſtrument as a marriage-ſettlement.

In a will the words "*heir* "*male*" may be *novem collectivum* to effectuate the general intention to include all the iſſue.

In a caſe before Lord *Bathurſt*, in which I was Counſel, it was ſtrongly argued, that, though it was the caſe of a deed, the interpretation of the words "*iſſue male*" might according to the obvious neceſſary meaning be held ſynonymous with "*heirs male of the* "*body.*" That was the caſe of *Fitzherbert* v. *Heathcote*, in *Chancery* upon the 9th of *December* 1771. It was a grant of a rent-charge of 20 *l.* a year iſſuing out of land. The party continued to pay it till his death in 1748. His ſon *Michael* refuſed to pay it; inſiſting, that his father was only tenant for life, with remainder to him in tail. It appeared, that part of the premiſes were limited to the father for life; remainder to his ſon *Michael* in tail; remainder over: but the capital meſſuage and other lands were limited to the father for life; remainder after his deceaſe to his

Under a limitation by deed to the father for life, remainder to his iſſue male, remainder to the father in fee, the ſons took by purchaſe as joint-tenants for life only: the word "*iſſue*" in a deed being a word of purchaſe.

(*a*) 1 *Salk.* 224. 1 Lord *Raym.* 208.

(*b*) Stated in *Fearne's Cont. Rem.* 228. from the various reports.

iſſue male; and for want of ſuch iſſue, to him, the father, in fee. There was no doubt, that they meant the ſame as the firſt and other ſons in tail male. Mr. *Fazakerley* and Mr. *Wilbraham*, who had been fixed upon to decide it by their opinion, held, that the father had an eſtate for life; remainder to his three ſons, as joint-tenants for life only; remainder to the father in fee. The ſon refuſed to abide by that opinion; and ſuffered a recovery; and deviſed the eſtate. The bill was filed by the heir at law of the grantee. Lord *Bathurſt* was clearly of opinion, that by the words "*iſſue male*" in a deed they took only as purchaſers and joint-tenants for life; and decreed according to the prayer of the bill.

That the word "*iſſue*" in a deed is a word of purchaſe, *Coke Littleton* was alſo relied on. This is the caſe of a deed. Therefore I am of opinion, that the limitation ſubſequent to the eſtate for life of *Elizabeth Holper* was a contingent remainder to ſuch perſon, as would be the heir male of her body at her death, in fee; and as *nemo eſt hæres viventis*, and *Thomas Holper* died in the life of his mother, that remainder never took place: but it veſted in the three daughters. The conſequence is, that the bill muſt be diſmiſſed; and the mortgagee has loſt all his money. I will give no coſts.

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July 18.

Upon petition praying reference to the Maſter as to the ſtate of the plaintiff and her fortune and directions for her maintenance, the property being too ſmall to bear a Commiſſion of lunacy, an order was made upon affidavits, without a reference, for payment of the dividends for the two enſuing quarters.

MARY EYRE by her will gave to *Charles Eyre* and *William Wake* 500*l.* upon truſt to place the ſame out at intereſt, and apply the ſame in ſuch manner, as they ſhould deem moſt adviſeable, for the benefit of her niece *Ann Eyre*, until ſhe ſhould be recovered from her then unfortunate ſituation; and if ſhe ſhould recover, to pay the ſaid ſum of 500*l.* to her; and if not, then that the ſame ſhould be paid to her executors or adminiſtrators immediately after her deceaſe. The teſtatrix gave the reſidue of her perſonal eſtate to her ſiſter *Clementina Eyre* and *Ann Eyre* equally, ſhare and ſhare alike; and ſhe appointed her truſtees executors.

By a codicil the teſtatrix revoked ſuch part of her will as directed the payment of a moiety of the reſidue of her perſonal eſtate to *Ann*

Ann Eyre; and ſhe directed, that the ſame ſhould be retained by her executors, and diſpoſed of by them in truſt for *Ann Eyre*.

Clementina Eyre by her will gave to the ſame truſtees 140*l.* upon truſt to place the ſame out at intereſt, and apply the intereſt for the ſupport and maintenance of *Ann Eyre*, as they ſhould judge proper, ſo long as ſhe ſhould remain in her unhappy ſituation; and if ſhe ſhould be reſtored to her health and former ſtate of mind, to pay the principal to her: but if ſhe ſhould die under the preſſure of the diſorder, then it was directed to ſink into the reſidue of the teſtatrix's perſonal eſtate. She alſo appointed the truſtees her executors. By a codicil ſhe reduced the bequeſt for the benefit of *Ann Eyre* to 100*l.*; which ſhe gave to *William Wake* only upon the ſame truſts.

The legacies given for the benefit of *Ann Eyre* by theſe two wills and a moiety of the reſidue of the perſonal eſtate bequeathed by the former produced 1700*l.* 3 *per cent.* Conſolidated Bank Annuities and 53*l.* 8*s.* 6*d.* caſh. *Ann Eyre* was alſo entitled to 200*l.* veſted in *James Farrer* for her ſole uſe and benefit; which ſum was ſecured upon mortgage of certain leaſehold premiſes; and to 16*l.* 13*s.* 4*d.* being one moiety of a third of 100*l.*, ſecured upon turnpike tolls, bequeathed to her by Mrs. *Freeman*. Her intereſt under theſe three wills conſtituted the whole of her property. She ſtill continued in a weak ſtate of mind, unable to manage her affairs; and had been for ſome time under the protection of *James Farrer*, her maternal uncle and one of the next of kin. In *Trinity* Term laſt ſhe by *James Farrer*, her next friend, filed a bill againſt the widow and executrix of *William Wake*, in whoſe name the ſtock was ſtanding, praying a transfer of the ſtock and payment of the caſh balance to the Accountant-General, to be laid out; and that the neceſſary directions might be given for the ſupport and comfort of the plaintiff *Ann Eyre*.

The defendant by her anſwer ſuggeſted, that the plaintiff *Ann Eyre* had a paternal uncle; and ſhe offered to transfer the ſtock and pay the balance, as the Court ſhould direct.

No farther proceedings were had in the cauſe, till a petition was preſented by the plaintiffs, ſtating theſe facts; and that the intereſt of the 200*l.* ſecured on the leaſehold mortgage had been from time to time received by or accounted for to *Farrer*, and applied for the benefit of *Ann Eyre*. The petition ſuggeſted, that the property was not ſufficient to defray the expence of a Commiſſion of Lunacy; and prayed, that it might be referred to the Maſter to inquire and ſtate, what is the ſtate of mind and condition in point of health of the petitioner *Ann Eyre*; and whether ſhe is in a capacity of taking care of herſelf and her affairs; alſo, by whom and in what manner ſhe has been and is maintained and ſupported; what is her fortune; who is in the receipt thereof; and that the defendant may transfer the ſtock and pay the balance of caſh in her hands to the Accountant-General in truſt in the matter of *Ann Eyre*, or to the credit of the cauſe; that the Maſter may tax the coſts of the defendant, to be retained out of the caſh in her hands; and that the reſidue of the caſh, and all future dividends upon the ſtock may be paid to the petitioner *Farrer* from time to time, to be applied in the firſt place in diſcharging the coſts incurred by him in this ſuit and application, and otherwiſe in the ſubſequent proceedings, and afterwards in the maintenance, ſupport, and cloathing, of *Ann Eyre*.

The balance of dividends upon the Bank Annuities, after taking credit for the maintenance and cloathing of *Ann Eyre*, was 29*l.* 5*s.*

Mr. Richards in ſupport of the petition.

The **Lord Chancellor** ſaid, this was in effect a petition for a Commiſſion of Lunacy; and he was afraid of eſtabliſhing the precedent. His Lordſhip obſerved, that a Commiſſion ought not to coſt 100*l.*

Mr. Barker (Clerk in court), being referred to, ſaid, the expence of a Commiſſion was about 120*l.*; but by great parſimony it might be brought within 100*l.*

The **Lord Chancellor** then ſaid, he was doing an irregular thing; but might as well do it completely; and therefore upon producing affidavits of the ſtate of the petitioner's mind and the amount of her fortune he would without a reference order payment of the dividends of the two next quarters, or a year; and then they muſt apply again by a ſhort petition; as the Court muſt know the ſtate of her mind and the amount of her fortune from time to time.

The order was drawn up for payment of the dividends of the two next quarters. (a)

(a) There have been inſtances before Lords *Northington* and *Thurlow* of a reference to the Maſter in ſimilar caſes; the fund being too ſmall to bear the expence of a Commiſſion. In the laſt caſe before Lord *Thurlow* the income was only 75 *l.* a year.

BULLOCK v. MENZIES.

July 19.

The Court refuſed to order a proviſion for a married woman out of dividends and intereſt, to which ſhe was entitled for life: ſhe refuſing to live with her huſband, an officer abroad with his regiment, and willing to receive her. If he had deſerted her, that would be a good ground.

Elizabeth Trehee Hall, wife of *John Stuart Hall*, was under the will of her firſt huſband entitled for her life to the uſe of her jewels, and of his plate, furniture, pictures, horſes, and carriages, and alſo to one third of the reſidue of his perſonal eſtate; which he had by his will directed to be lent out on good ſecurity, and the intereſt to be regularly paid to her for her uſe and benefit; and that ſhe might enjoy the ſame during her natural life; and after her death the principal to be for their two children.

By the decree made upon the 22d of *November* 1796 the uſual accounts were directed; and it was ordered, that the money ariſing by ſale of ſuch of the jewels, plate, furniture, *&c.*, as had been ſold, ſhould be paid into the bank; and it was declared, that the intereſt of the money produced by ſuch ſale, and the uſe and poſſeſſion of ſuch of the ſaid articles, as remained unſold, and alſo the intereſt of one-third of the reſidue of the teſtator's perſonal eſtate, belonged to the Defendant *John Stuart Hall* and his wife in her right during her life, with liberty upon her death for any perſon intereſted to apply.

In *July* 1797, upon the petition of Mrs. *Hall*, ſtating, that her huſband was a captain in the 38th regiment, and was then with his regiment in the *Weſt Indies*, for which place he embarked in *April* 1796, an order was made, that out of one third of the dividends upon 27,520 *l.* 6 *s.* 8 *d.* 3 *per Cent.* Conſolidated Bank Annuities the yearly ſum of 200 *l.* from *Chriſtmas* laſt ſhould be paid to the petitioner by half-yearly payments.

In *June* 1798 the huſband preſented a petition, ſtating his return from the *Weſt Indies* in the *November* preceding; and that ſince his return he had been always willing to receive his wife to reſide with him, but which ſhe declined to do; and praying, that the ſaid order might be varied by directing, that the ſaid ſum of 200*l.* might be paid to him and her jointly. Mrs. *Hall* refuſed to conſent to the prayer of that petition; and therefore the order, that had been obtained by her, was diſcharged.

Mrs. *Hall* afterwards preſented a petition; ſtating, that her huſband has no other property than his pay to ſupport her and himſelf; that ſince her annuity ceaſed ſhe has lived at the expence of her friends; that her huſband has exchanged into the 86th regiment, and is now in the *Eaſt Indies*, or upon his paſſage; and ſailed on the 24th of *November* 1798; that his reaſon for exchanging was, as the petitioner verily believes, to avoid his creditors; and ſince he ſailed he has been outlawed in an action for 300*l.*; which outlawry is now in force againſt him; that before he left *England* he did not make any arrangement or proviſion for the maintenance of the petitioner. The petition prayed an order for payment of the ſaid annuity to the petitioner out of one third of the ſtock and caſh, to commence from *Chriſtmas* 1797, or ſuch other payment, as the Court ſhould think fit.

The funds, to the dividends and intereſt of one third of which the petitioner was entitled for her life, were 32,868*l.* 6*s.* 4*d.* 3 *per Cent.* Conſolidated Bank Annuities, and 776*l.* 17*s.* 10*d.* caſh.

The Attorney General (*a*) *and Mr. Piggott in ſupport of the petition* cited *Allerton* v. *Knowel*, from a manuſcript note; in which the Court made ſuch an order for a proviſion for Mrs. *Knowel* out of intereſt, to which ſhe was entitled for her life: her huſband having deſerted her.

LORD CHANCELLOR—That is a ground. But here is an officer, going from place to place in the courſe of his duty; and he is willing to receive her. I cannot, becauſe a woman does not chooſe to live with her huſband, decree a ſeparation between huſband

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(*a*) Sir *John Mitford*.

band and wife, and give her a ſeparate alimony. It is his property in her right. Her marriage with him might have been prudent, or not: but ſhe is his wife; and he is willing to ſupport her and himſelf with this fund. (*b*).

Petition diſmiſſed.

(*a*) See *Ball* v. *Montgomery*, *ante*, vol. 2. 191.

July 22.

BRANDER *v.* BRANDER.

The 5 *per Cent.* Annuities of 1797 created upon the ſubſcription of the Bank for the public ſervice and in purſuance of a reſolution of the Bank divided among the proprietors of Bank Stock *pro ratâ* are conſidered as an accretion to the capital; and therefore a perſon entitled for life can have the benefit of it by way of dividend only.

By the decree pronounced in this cauſe *John Spicker Brander* was declared entitled to the reſidue of the teſtator's perſonal eſtate for his life, ſubject to an annuity. The reſidue conſiſted of 9996 *l.* 2 *s.* 3 *d.* Bank 3 *per Cent.* Annuities: 10,000 *l.* Bank Stock: 1000 *l.* Bank 5 *per Cent.* Annuities of 1797; and 351 *l.* 1 *s.* 9 *d.* caſh; ſtanding in the name of the Accountant General in truſt in the cauſe.

The fund of 1000 *l.* Bank 5 *per Cent.* Annuities of 1797 aroſe from the tranſaction between Government and the Bank in that year. The Bank having ſubſcribed and paid out of their funds for the ſerviee of the public the ſum of 1,000,000 *l.*; and received for the ſame 1,125,000 *l.* 5 *per Cent.* Annuities of 1797. The Bank lately came to the following reſolution; that a participation of the ſum of 1,125,000 *l.* of the 5 *per Cent.* Annuities of 1797 ſtanding in the name of the Governor and Co. of the Bank of *England*, be made among the preſent proprietors of Bank Stock *pro ratâ* according to their reſpective intereſts: the transfer of the ſame to be made upon the firſt day of *June* 1799. In purſuance of this reſolution the Bank transferred 1000 *l.* 5 *per Cent.* Bank Annuities of 1797 to the Accountant General, in truſt in this cauſe; being the proportion, to which *John Spicker Brander* was entitled under ſuch reſolution in reſpect of the ſaid 1000 *l.* Bank Stock.

A petition was preſented by *John Spicker Brander* and by *John Lloyd*, the perſonal repreſentative of the annuitant; praying, that out of the ſum of 351 *l.* 1 *s.* 9 *d.* caſh the arrears of the annuity may be paid; and that the reſidue thereof may be paid to the petitioner *John Spicker Brander*; and that the whole of the intereſt and dividends due and to grow due upon the ſaid 10,000 *l.* Bank Stock and 9996 *l.* 2 *s.* 3 *d.* Bank 3 *per Cent.* Annuities may from time to time be paid to the petitioner *Brander* during his life; and that the ſaid 1000 *l.* Bank 5 *per Cent.* Annuities of 1797, together with the intereſt and dividends due and to accrue due thereon, may be transferred and paid by the Accountant General to the petitioner *Brander*.

Mr. Mansfield and Mr. Fonblanque for the petition contended, that the Bank have no right to increaſe their capital; and if it could be clearly made out, that the capital of the Bank in 1797 was full to the extent authoriſed, every thing *ultrà* was diviſible among the proprietors.

LORD CHANCELLOR—If I am to go upon your principle, I muſt hunt it back; and ſee, to what part of that ſaving each is entitled. I have often conſidered this queſtion; and it ſeemed to me, in all the different ways I could turn the conſideration of it, that there was no way to be taken but to conſider it as an accretion to the capital; and the tenants for life will have the benefit of the dividends.

The Attorney General compared it to the caſe of an unopened mine; obſerving, that the Court would direct that to go in the manner the eſtate was ſettled, and would not ſuffer the tenant for life to run away with that property, though an accidental profit; and he ſuggeſted, that the proper way would be to make ſome proviſion by law, that the Stock ſhould be ſold, and made Bank Stock.

The Solicitor General (*a*) ſaid, the Bank might have kept this as a Corporation; and might have received the dividends upon it.

Mr. Richards ſaid, the queſtion had been before the Maſter of the Rolls in a cauſe heard by conſent upon Lord *Calthorpe*'s will; and the Maſter of the Rolls conſidered it as an accretion to the capital.

(*a*) Sir *William Grant*.

Mr. Piggott (Counſel to the Bank) ſaid, the Bank Directors conſider it ſo; that the neceſſity of its not being previouſly known, that any thing of this kind was to be done, prevented the Bank from conſulting any one upon it: but he had given a general opinion, that it was to be transferred to the proprietor, and he would be poſſeſſed of it juſt upon the ſame truſts and for the ſame intereſts, as he had in the Bank Stock. It has the ſame effect, as if the dividend was increaſed. It is not divided as annual profit; as their charter directs: but it has become capital. It might as well be contended, that the tenant for life has a right to have buildings ſold, and to have the profit.

Lord Chancellor—The ſame thing in effect has been done, when the Bank has increaſed the dividend; the ground of which has been, that there has been a gradual ſaving; of which they give the benefit to the proprietor, not by payment of a ſum of money, but by additional dividend. It would be a neater way to convert it into Bank Stock. They could not do that without an Act of Parliament. Making an increaſe of dividend they do not diſplace any one intereſt in that Stock. The proper order is, that the dividends upon the 1000*l.* Bank 5 *per Cent.* Annuities of 1797 be paid from time to time to the petitioner; who is entitled for life.

The Order was drawn up accordingly.

KENNELL v. ABBOTT.

Rolls,
June 1,
1797.
July 22,
1799.

If a legacy is given to a perſon under a particular character, which he has falſely aſſumed, and which alone can be ſuppoſed the motive of the bounty, the rule of the Civil Law is adopted, and the legacy fails. Therefore, where a legacy was given by a woman to a man in the character of her huſband, whom ſhe ſuppoſed and deſcribed as ſuch, but who at the time of the marriage ceremony with her had a wife living, the Court in reſpect of his conduct held him not entitled; but inclined to think it would be otherwiſe, where from circumſtances not moving from the legatee himſelf the deſcription is inapplicable; as where a teſtator gives a legacy to a child from motives of affection, ſuppoſing it his own, but is impoſed upon in that reſpect.

A legacy out of the produce of a copyhold eſtate, directed to be ſold, failing was held to paſs by the reſiduary clauſe againſt the heir: the object being a general converſion out and out.

James Hickman by his will, dated the 18th of *April* 1782, gave to his wife *Catherine* 300*l.* 4 *per Cent.* Conſolidated Bank Annuities; and appointed her ſole executrix. Upon his death ſhe poſſeſſed herſelf of his perſonal eſtate; paid his debts, &c.;

and exhibited the probate to the Bank; but not applying to be at liberty to transfer the Stock into her own name, it continued to ſtand in the name of the teſtator.

In 1783 a marriage ceremony was performed between *Catherine Hickman* and *Edward Lovell*: but that marriage was void; *Lovell* having been married in 1775; and his wife being living. He cohabited with his wife till 1782. By articles executed previouſly to the marriage ceremony with *Catherine Hickman*, dated the 3d of *January* 1783, ſhe agreed to transfer the ſaid Stock upon the truſts therein mentioned, with power to her to diſpoſe of it after the deceaſe of her ſurvivor of herſelf and *Lovell*. She never diſcovered the invalidity of her marriage; and being ſeiſed to her and her heirs of a copyhold eſtate, which ſhe had ſurrendered to the uſe of her will, and being poſſeſſed of a leaſehold eſtate for a long term of years determinable upon lives, and of perſonal eſtate, ſhe made her will, duly atteſted according to the *Statute of Frauds*, deſcribing herſelf as the wife of *Edward Lovell;* and by virtue of the power and authority given her before her marriage with her preſent huſband *Edward Lovell*, ſhe publiſhes and declares her laſt will and teſtament; giving the ſaid 300 *l.* Stock to her brother *Thomas Abbott*, in truſt to pay the intereſt to her niece *Betty Kennell* for life; and after her deceaſe the principal to be equally divided between her two daughters ſhare and ſhare alike. She gave ſome leaſehold premiſes to her nephew *Martin Togood*, his executors and adminiſtrators. She gave a copyhold eſtate, which ſhe had ſurrendered to the uſe of her will, to her brother *Thomas Abbott* and his heirs, in truſt to ſell, and out of the monies ariſing therefrom to pay the following legacies: "to my huſband the ſaid "*Edward Lovell* the ſum of 150*l.*;" to her brother *Thomas Abbott* 20 *l.*; to her nephew *James Fabian*, her niece *Elizabeth Cox*, and her nephew *George Togood*, 10 *l.* each; and ſhe directed theſe legacies to be paid within twelve months after her deceaſe. She gave another leaſehold eſtate to her great niece *Catherine Kennell*, her executors, &c.; and ſhe gave all her houſehold goods, plate, furniture, and ſtock in huſbandry, to her brother *Thomas Abbott*, his executors and adminiſtrators, in truſt to ſell, and out of the produce to put in the life of her ſaid great niece into the ſaid leaſehold premiſes, if ſhe (the teſtatrix) ſhould not do it in her life. She gave her wearing apparel and linen to her niece *Betty Kennell;* and as to the reſidue of the purchaſe money ariſing from the ſale of her ſaid copyhold eſtate, houſehold goods, and furniture, and all the reſt, reſidue, and remainder, of her monies, ſecurities for money, perſonal eſtate and effects, whatſoever and whereſoever, that ſhe ſhould die poſſeſſed of, intereſted in, or entitled to, or whereby ſhe had power to diſpoſe by will, ſhe gave to her ſaid niece *Betty Kennell*, her executors and adminiſtrators, ſubject to her debts and funeral expences; and ſhe appointed *Thomas Abbott* guardian of the children of *Betty Kennell*, and appointed *Betty Kennell* executrix.

The teſtatrix died; leaving *Edward Lovell* ſurviving her, and *John Abbott*, her eldeſt brother, her heir at law. *Betty Kennell* proved her will: but the probate was limited to the 300*l.* ſtock, and 100*l.* ſtock ſuppoſed to be ſtanding in the name of, and purchaſed by, the truſtees, under the articles of the 3d of *January* 1783. *Edward Lovell* died; leaving an infant ſon by his lawful wife *Ann Lovell*; with whom he lived till 1781. She died in 1788.

The bill was filed by legatees under the will of *Catherine Hickman*; praying, that the truſts of her will may be eſtabliſhed, except ſo far as relates to the bequeſt to *Edward Lovell* and the lapſed legacy to *James Fabian*, who died in the life of the teſtatrix, and to the guardianſhip of the infant plaintiffs; and that the pretended marriage articles may be declared void.

The queſtion aroſe upon the legacy of 150*l.* given to *Edward Lovell*; which was claimed on the part of his infant ſon. Suppoſing that legacy void, it was claimed by the reſiduary legatee, by the heir, and alſo by the next of kin.

Mr. Woodeſon for the plaintiffs—This legacy is clearly void. The books of the Common Law are barren upon ſuch queſtions. *Swinburne* has collected the authorities from the Civil Law. In the *Digeſt* (*a*) this rule is laid down; "*Falſam cauſam legato non* "*obeſſe verius eſt; quia ratio legandi legato non cohæret; ſed ple*-"*rumque doli exceptio locum habebit ſi probetur alias legaturus non* "*fuiſſe.*" The *Code* (*b*) ſays, "*Fidei commiſſum ejus qui reliquerat* "*pænitentiâ probatâ ſucceſſores nunquam præſtare compelluntur.*" The word "*probatâ*" is rendered "probable"; which is the true

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(*a*) Book xxxv. tit. 1. l. 72. ſ. 6. (*b*) Book vi. tit. 42. l. 27.

1799.

KENNELL *v.* ABBOTT.

ſenſe; not "demonſtrated" *Swinburne* (*a*) ſtates, that the legacy fails, though the teſtator were ignorant of the injury done to him by the legatory, when it is ſuch, for which it is very likely the teſtator would have revoked the legacy.

The teſtatrix gives this legacy to a perſon, who, ſhe ſuppoſes, anſwers the deſcription of her huſband; and ſhe intends it for him in that character only.

Suppoſing this legacy void, it belongs to the reſiduary legatee of this ſpecific fund; who is likewiſe the general reſiduary legatee. This is purely a queſtion of intention. The reſiduary clauſe was framed purpoſely to preclude any intention of dying inteſtate; and the words are as general as can be. The intention was clearly to convert the property out and out; according to the diſtinction taken in Mr. *Cox*'s note to *Cruſe* v. *Barley* (*b*). Where the funds are blended into one fund, as they are by this reſiduary clauſe, that is in favor of the reſiduary legatee. This is not merely a real fund, as in *Hucheſon* v. *Hammond* (*c*). The foundation of the claim of the heir is, that the heir may take the eſtate, paying all the charges upon it, and prevent a ſale. In this caſe the ulterior intereſt is given to the reſiduary legatee; and ſhe only could prevent a ſale; which excludes the heir. *Durour* v. *Motteux* (*d*) eſtabliſhes the general principle. *Akeroid* v. *Smithſon* (*e*) was the caſe of a reſidue left to ſeveral. If it had been a joint-tenancy, the ſurviving reſiduary legatee would have taken; but Lord *Thurlow* thought it a tenancy in common. His Lordſhip's opinion was changed by Mr. *Scott*'s argument. In this caſe the next of kin are out of the queſtion; for they muſt claim it as perſonalty; and then it would be included in the reſiduary clauſe. A legacy void by law is upon the ſame footing as a legacy lapſed by the death of the legatee in the life of the teſtator. The Court will not preſume, that the

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(*a*) Page 557.

(*b*) 3 *P. Wms.* 20. The caſes upon this ſubject are there collected and arranged by Mr. *Cox*. Thoſe, which have lately concurred, are *Robinſon* v. *Taylor*, 2 *Bro. C. C.* 589. *ante*, vol. 1. 44. *Hutcheſon* v. *Hammond*. *Spink* v. *Lewis*, 3 *Bro. C. C.* 128. 355. *Ex parte Bromfield*; *Oxenden* v. *Lord Compton*; *Walker* v. *Denne*; *Lord Compton* v. *Oxenden*; *Chitty* v. *Parker*; *Collins* v. *Wakeman*; *Howſe* v. *Chapman*, *ante*, vol. 1. 453. Vol. 2. 69. 170. 261. 271. 683. Vol. 3. 210. vol. 4. 542.

(*c*) 3 *Bro. C. C.* 128.

(*d*) 1 *Veſ.* 320.

(*e*) 1 *Bro. C. C.* 503. and in Mr. *Cox*'s note.

teſtatrix had any intimation of *Lovell*'s marriage; and the circumſtances are againſt ſuch preſumption.

Mr. Steele for the next of kin gave up the point (*a*).

Mr. Stanley for the heir concurred with the plaintiffs, that the legacy was void.

Upon the other queſtion—This ſum partakes of the nature of real eſtate undiſpoſed of. The caſes cited were caſes of a mixed fund; where the intention was to convert out and out. No ſuch intention appears upon this will: but there is a clear intention to ſeparate this ſum of 150*l.*, conſidering it as land, from the reſidue. Therefore it is not diſpoſed of upon the authority of *Cruſe* v. *Barley*; which is expreſs for the heir. *Arnold* v. *Chapman* (*b*).

Mr. Cox for the defendant Lovell—No queſtion is made of the identity of the perſon. The deſcription is ſufficient to leave no room to doubt, who was intended; and then the general rule ought to take place, that if the perſon is ſufficiently deſcribed, whether the deſcription is right or wrong, he ſhall prevail. The Civil Law is not to be attended to upon this ſubject. This is a diſpoſition of part of the real eſtate. It is treated as real eſtate throughout. Upon a queſtion ariſing upon real property the Civil Law can have no weight. The whole Civil Law, as a general body, is not adapted to our law even as to legacies. The preſumption, the Court is deſired to adopt, is a preſumption of the Civil Law; that if the legatee does not anſwer the deſcription the teſtator has added to the name, it ſhall be preſumed, that if the teſtator had known, he did not anſwer that deſcription, the legacy would not have been given. It is very doubtful, whether that is a fair preſumption. A legatee has been often deſcribed by a wrong deſcription; as, where a natural child is called a child. Suppoſe, a teſtator by miſtake called a perſon firſt couſin, who was ſecond couſin; deſcribing him otherwiſe, ſo that there could be no doubt, who was meant. This is a preſumption, that a court of juſtice will hardly introduce for the firſt time. But ſuppoſing it clear, that the teſtatrix did not know the fact of *Lovell*'s marriage; will the Court ſuppoſe, there might not be this degree of affection pre-

(*a*) See *Shanley* v. *Baker*, and *Brown* v. *Higgs*, *ante*, 708, 732.

(*b*) 1 *Veſ.* 108.

vailing between perſons, who had lived in this way; as if they were really huſband and wife? The plaintiffs muſt rely upon it's being a fraud by *Lovell;* and that reſts entirely upon the Civil Law. He might have had ſome falſe intelligence of the death of his wife.

Mr. Wooddeſon in reply—The fraud is manifeſt from the dates. He married in 1775, and lived with his wife till 1781; which carries it very near the time of the ſuppoſed marriage with the teſtatrix. What the Civil Law ſays is carried farther by *Swinburne;* who is a general writer upon the teſtamentary law of this country; and is an authority. He does not put it upon the want of *deſignatio perſonæ*, but upon the ground of fraud. In *Cruſe* v. *Barley* there was an intention to take the 200*l.* out, to give a preference over the other children. If that caſe is conſidered as eſtabliſhing the general principle, and not as turning upon the ſpecial intention, it is overruled by *Durour* v. *Motteux*. *Hutcheſon* v. *Hammond* alſo was determined ſimply upon the intention. In *Arnold* v. *Chapman* the Charity could not take the 1000*l.*; which reduced it to the queſtion between the heir and the next of kin; as in *Akeroid* v. *Smithſon*, and *Digby* v. *Legard* (*a*); which do not apply; becauſe there the queſtion was not between the reſiduary legatee and the heir. In this caſe there is no diſtinction between the funds.

The Maſter of the Rolls during the argument mentioned the caſe of *The Ducheſs of Kingſton;* who held an eſtate under a deviſe by the Duke to her, as his loving wife.

July 22, 1799.

Maſter of the Rolls—This caſe has ſtood a long time; and I believe, the reaſon I have not been deſired to give my judgment, is, that it has abated; and perhaps it may be unneceſſary to give it. But as upon very full conſideration I have made up my mind, it may be of uſe, that the parties may know my opinion, in caſe they think fit to revive it.

The cauſe ariſes upon the will of *Catherine Hickman;* who ſuppoſed herſelf to be married to *Edward Lovell;* with whom ſhe

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(*a*) Stated in Mr. *Cox's* note to *Cruſe* v. *Barley*, 1 *P. Wms.* 20.

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Kennell *v.* Abbott.

had celebrated a marriage. It now appears, that he was a married man at that time: therefore ſhe is in fact a ſingle woman; and it was a groſs fraud as to her. She made her will in execution of the power given to her by the articles executed previouſly to the ſuppoſed marriage; and not aware, that ſhe was a ſingle woman. Upon that will the queſtions ariſe. The firſt queſtion is, whether this legacy of 150*l.* charged upon the produce of the ſale of the copyhold eſtate deviſed in truſt to be ſold is or is not a legacy, which this man can claim under the circumſtances, that it is given to him as the huſband of the teſtatrix; though he does not poſſeſs that character. I thought it a caſe rather novel in it's circumſtances, and that ſcarcely has afforded any deciſion in the law of *England*; though there are ſome *dicta* in the Civil Law, that ſeem to bear upon the point. The paſſage cited from the *Code*, I think, does not much apply. The paſſage in the *Digeſt* is "*Falſam* "*cauſam legato non obeſſe verius eſt, quia ratio legandi legato non* "*cohæret: ſed plerumque doli exceptio locum habebit, ſi probetur alias* "*legaturus non fuiſſe.*"

By the Civil Law a falſe reaſon given for a legacy is not of itſelf ſufficient to deſtroy it, unleſs fraud; from which it may be preſumed, that, if known, the legacy would not have been given.

The meaning is, that a falſe reaſon given for the legacy is not of itſelf ſufficient to deſtroy it: but there muſt be an exception of any fraud practiſed; from which it may be preſumed, the perſon giving the legacy would not, if that fraud had been known to him, have given it. That from a book of great authority ſeems to be the principle of the Civil Law.

The queſtion is, whether according to the Law of *England* that can apply to a caſe like the preſent; and whether the law will permit a man, who obtains a legacy in ſuch a manner, to have the benefit of it. I have not been able to find any thing, that bears any very deciſive analogy to this: but upon general principles I am of opinion, it would be a violation of every rule, that ought to prevail as to the intention of a deceaſed perſon, if I ſhould permit a man availing himſelf of that character of huſband of the teſtatrix, and to whom in that character a legacy is given, to take any part of the eſtate of a perſon, whom he ſo groſsly abuſed; and who muſt be taken to have acted upon the duty impoſed upon her in that relative character. I deſire to be underſtood not to determine, that, where from circumſtances not moving from the legatee himſelf the deſcription is inapplicable, as where a perſon is ſuppoſed to be a child of the teſtator, and from motives of love and affection to that child, ſuppoſing it his own, he has given a legacy to it, and it afterwards turns out, that he was impoſed upon, and the child was not his own, I am not diſpoſed by any means to determine, that the proviſion for that child ſhould totally fail; for circumſtances of perſonal affection to the child might mix with it; and which might entitle him; though he might not fill that character, in which the legacy is given. My deciſion therefore totally avoids ſuch a point. Neither would I have it underſtood, that if a teſtator in conſequence of ſuppoſed affectionate conduct of his wife, being deceived by her, gives her a legacy, as to his chaſte wife, evidence of her violation of her marriage vow could be given againſt that. It would open too wide a field. But this deciſion ſteers clear of that point. This is a legacy to her ſuppoſed huſband and under that name. He was the huſband of another perſon. He had certainly done this lady the groſſeſt injury a man can do to a woman; and I am called upon now to determine, whether the Law of *England* will permit this legacy to be claimed by him. Under theſe circumſtances I am warranted to make a precedent; and to determine, that, wherever a legacy is given to a perſon under a particular character, which he has falſely aſſumed, and which alone can be ſuppoſed the motive of the bounty, the Law will not permit him to avail himſelf of it; and therefore he cannot demand his legacy.

Upon a legacy to the wife of the teſtator, by the deſcription of his chaſte wife, evidence of her incontinence is not admiſſible.

A caſe (*a*) ſomething like this occurred lately; which took up ſo much time before the Lords Commiſſioners upon an application for a writ *de ventre inſpiciendo* againſt a woman, who had lived with Mr. *Fellowes*, and had made him believe, ſhe had been brought to bed of ſeveral children; which he was weak enough to ſuppoſe his. It was not a queſtion, whether they were his children; for if ſo, I do not apprehend, the decree would have been ſuch as it was. But there were no ſuch children. She had ſhewn him children as hers, which were not hers; and he gave legacies to them, as her children by him. It was held, that they were not entitled. There two things were wanting. The teſtator was not merely deceived as to their being his children; but he was deceived as to the other ingredient of the character, in which he gave them the legacies; for they were not the children of that woman. Therefore upon the principle, I have mentioned from

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(*a*) *Ex parte Wallop*, 4 *Bro. C. C.* 90.

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the Digeſt, and that ought to govern Courts of juſtice, I am of opinion, this legacy could not be claimed.

The next queſtion is more difficult. It turns ſtrictly upon the Law of *England;* whether a legacy given out of the produce of a copyhold eſtate directed to be ſold, and failing, ſhall fall into the reſidue, or go to the heir. There have been different determinations upon it; to ſome of which I cannot perfectly accede: but my determination will not ſhake any. *Cruſe* v. *Barley; Arnold* v. *Chapman*, and *Hutcheſon* v. *Hammond*, were cited. In the laſt an eſtate was deviſed in truſt to be ſold; and out of the purchaſe-money ſeveral legacies were given; and the reſidue of the purchaſe-money was diſpoſed of. The queſtion was, whether one of the legacies failing by the death of the legatee in the life of the teſtatrix fell into the ſurplus, or was to be conſidered as ſo much real eſtate undiſpoſed of. There were two reſidues: one a ſpecial reſidue, ſo much of the money ariſing from the ſale of the eſtate as was not exhauſted by the particular legacies: the other, the general reſidue. Mr. Juſtice *Buller* was of opinion, that the lapſed legacy of money produced by the ſale of real eſtate fell into neither, for it was contended as to both; but that it reſulted to the heir, as wholly undiſpoſed of. My determination will not interfere with that. There are many eſſential differences. This teſtatrix has given ſeveral particular parts of her eſtate; ſtock, leaſehold eſtates, houſehold goods, furniture, and many other articles; and this copyhold eſtate; which ſhe orders at all events to be ſold, and out of the purchaſe-money ſhe directs theſe legacies to be paid; and ſhe makes a reſiduary diſpoſition; as to which the queſtion is, whether it is not to all intents a general reſiduary clauſe, carrying every thing not diſpoſed of. I am of opinion it is, under *Mallabar* v. *Mallabar* and *Durour* v. *Motteux*. It is making the real eſtate to all intents and purpoſes perſonal; and then taking a retroſpective view of what ſhe had done, and meaning to give every thing not diſpoſed of, ſhe adds this reſiduary clauſe. Therefore I think, this eſtate is turned entirely into money. The teſtatrix contemplated it as ſuch; and part of it not being well diſpoſed of, the reſiduary clauſe gives not only every thing not expreſsly diſpoſed of, but alſo every thing lapſed, or by any means not diſpoſed of. It was long doubted, whether, if an eſtate was deviſed charged with legacies, which failed from the nature of the legacies themſelves, as if they were charitable legacies, the deviſee was entitled to ſo much as conſiſted of thoſe legacies. In *Barrington* v. *Harris*, in which the queſtion aroſe, Lord *Bathurſt* at firſt thought the heir entitled upon the caſes of *Cruſe* v. *Barley* and *Arnold* v. *Chapman*: but afterwards his Lordſhip changed his opinion; and determined, and it is now perfectly ſettled, that if an eſtate is deviſed, charged with legacies, and the legacies fail, no matter how, the deviſee ſhall have the benefit of it, and take the eſtate. That caſe is in ſome degree analogous to this; which is the caſe of an eſtate to all intents and purpoſes turned into money; and therefore this legacy belongs to the reſiduary legatee.

If an eſtate is deviſed, charged with legacies, which fail, the deviſee and not the heir ſhall have the benefit of it.

Declare, that *Edward Lovell*, to whom the legacy of 150*l.* is given as the huſband of the teſtatrix, was not entitled; and that legacy fell into the reſidue of her eſtate, given by her will to *Betty Kennell*.

HARTWELL *v.* HARTWELL.

Rolls, *July* 11, 1797. *July* 22, 1799.

EDWARD HARTWELL by his bond dated the 3d of *January* 1776, became bound to his mother in the penal ſum of 1000*l.*; with a condition reciting, that by the death of the obligor's father *Joſeph Hartwell*, late commander of the *Dartmouth* Packet between *Holyhead* and *Dublin*, the command was become vacant; and that by the interpoſition and earneſt recommendation of ſeveral of his friends the ſaid *Edward Hartwell* was appointed Commander of the ſaid Packet, but on the expreſs condition of his making a ſuitable allowance towards the ſupport and maintenance of his mother and of his brother and ſiſters; it was declared, that if the ſaid *Edward Hartwell* ſhould pay to his mother an annuity of 100*l.* during her life, then the obligation ſhould be void.

Edward Hartwell continued in the command of the Packet till his death in 1795. The bill was filed by his mother againſt his widow and executrix to have the annuity eſtabliſhed againſt his aſſets.

The anſwer ſtated, that the Packet was employed in the ſervice of Government in carrying the Mails; and that the command is in

Bond to ſecure an annuity to the obligor's mother for life: the condition reciting, that by the recommendation of friends he had been appointed to ſucceed his father in the command of a Government Packet, but on the expreſs condition of his making an allowance for the ſupport of his mother, *&c.*: The Maſter of the Rolls inclined to diſmiſs the bill filed againſt his executrix: but gave the plaintiff leave to bring an action.

in the gift of the Poſtmaſter-General; and the defendant ſubmitted, that the bond being given to ſecure an annuity as the conſideration for the appointment of *Edward Hartwell* to ſuch appointment is illegal and void. The defendant believes, *Edward Hartwell* was appointed to the command without any condition whatever being annexed to the appointment; and that the appointment was in writing, and ſigned by Lord *Le De Spencer* and The Right Hon. *Henry Frederick Thynne*, the Poſtmaſter-General; and it ſet forth the appointment; ſtating, that upon the good teſtimony and aſſurance they had received, as well of the fidelity and loyalty to His Majeſty of *Edward Hartwell*, as of his art and experience in navigation, they appointed him commander of the ſaid Packet. The appointment was dated the 5th of *January* 1776.

Mr. Grant and Mr. Pemberton for the plaintiff—How can this bond be brought within the principle of Place-brokage bonds? It is not given to any perſon, who had the power of appointment; nor to any party, who recommends to the appointment. There is no bribery; no corrupt agreement. The office is foreign to the adminiſtration of juſtice, and the collection of the revenue. It is not of the nature of any of thoſe offices in the *Statute* (*a*); by analogy to which theſe caſes have been decided. I admit, ſome of the caſes have been out of that *Statute*: but down to *Harrington* v. *Du Chatel* (*b*) all the caſes have been conſidered as falling within the equity of it. No caſe can be ſtated but caſes of corrupt agreements: a perſon ſelling either his appointment or his influence. In *Thrale* v. *Roſs* (*c*) the injunction was diſſolved. In *Parſons* v. *Thompſon* (*d*) the agreement was directly for the benefit of the party reſigning. So it was in *Garforth* v. *Fearon* (*e*). This is not a ſtipulation for the benefit of a party making the appointment or the recommendation. Can this be called a baſe, diſhoneſt, or even, an intereſted, agreement? What intereſt had theſe friends recommending in the payment of this annuity? They got nothing: but they impoſed upon this man the performance of a moral duty. In all the other caſes there has been extortion practiſed for the direct benefit of the perſon practiſing it. Could the agreement in *Harrington* v. *Du Chatel* be called an innocent,

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(*a*) Statute 5 & 6 *Edw.* 6. c. 16 (*b*) 1 *Bro. C. C.* 124. (*c*) 3 *Bro. C. C.* 57.
(*d*) 1 *Hen. Black.* 322. (*e*) 1 *Hen. Black.* 327.

or

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HARTWELL v. HARTWELL.

or any thing like a fair agreement? The annuity would never have been granted but for the intervention of Lord *Rochford*; of whom the annuitants were mere dependents. There was no moral obligation. This is ſtronger than if it had been obtained by the interpoſition of the friends of a mere ſtranger. It is purely a family tranſaction. Where can be the immorality? *Law* v. *Law* (*a*), though the caſe of two brothers, was an exaction of one brother for his own benefit. If the Commiſſioners of the Cuſtoms had been informed of it, they would have objected. Can that be ſtated in this inſtance? This is done every day by perſons propoſing themſelves for elective offices, making a merit of ſuch an offer. This annuity is not ſtipulated to be paid out of the profits of the office; and it is for the life of the plaintiff: probably becauſe ſhe was his mother. He had no opportunity of impoſing upon the public; for upon this eſtabliſhment there is a ſtated ſalary; and the reſt of the profit ariſes from paſſengers. This is not like the caſe of Cuſtom Houſe Officers, but within the reaſon of *Bellamy* v. *Burrow* (*b*).

The Maſter of the Rolls ſaid, he muſt leave them to try it at law.

Mr. Romilly for the Defendant—This comes immediately within the principle of all the caſes; which is not, as ſtated, in analogy to the *Statute* of *Edward* the 6th; but, that neither an appointment nor a recommendation to ſuch an office can be the ſubject of a pecuniary contract; that it is corrupt and illegal for a perſon having an appointment or a power to recommend to take money for the appointment or the recommendation. This appointment was under no ſuch condition as is repreſented: but I take it for granted it was annexed to the recommendation. No condition is expreſſed in the appointment: but if that condition was expreſſed, it would be bad. There is no difference from the pecuniary conſideration being taken by another perſon, not by him, who makes the appointment: otherwiſe it might be done obliquely: it might always be done through the medium of a truſtee. In *Law* v. *Law* there was juſt the ſame reaſon to ſend it to law. In *Parſons* v. *Thompſon* Lord *Loughborough* puts the caſe of the conſideration not being, as it was, the reſigning an

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(*a*) *For.* 140. 3 *P. Wms.* 391.

(*b*) *For.* 97.

office, but the recommendation to an office; and ſays, there could not be the leaſt doubt upon it; and reaſons from it as a much ſtronger caſe than that before him. The principle is, that the perſon recommending is to have nothing in view but the public advantage, and the qualities of the perſon recommended to fill the office; and that has been carried ſo far, that in *Harrington* v. *Du Chatel* Lord *Thurlow* puts the caſe of a private ſervant; and ſays, he ſhould hold clearly, that in that caſe a conſideration given for the recommendation of a ſervant could not be maintained; upon the principle, that the perſon recommending ought to have in view only the advantage of the perſon conſulting him. The principle of marriage-brokage bonds is exactly the ſame. In *Morris* v. *M'Cullock* (a) Lord *Northington* conſiders it as peculiarly matter of the juriſdiction of this Court. It is clear a Court of Law would not ſupport this bond. The Court therefore will not put this Defendant to the expence of defending an action. I do not ſay, it was corrupt: but it was contrary to principles of public policy. Upon that ground only the defence reſts; upon principles of Common Law, not upon any *Statute*. Is that emolument, which the public pays for ſervices done, to be diſtributed in charity, or to go, as intended, to the man, who does the ſervice? It is impoſſible to go into an inquiry as to the motives. *Harrington* v. *Du Chatel* was not decided upon the ground, that the perſon was a dependant of Lord *Rochford*. It is impoſſible to maintain, that any part of the profits of an office can be given to a perſon, who does not exerciſe that office. The reaſon of giving a ſalary is, that it is ſuppoſed, it is neceſſary for executing the office. In *Ex parte Curtis*, on the 25th of *March* 1783, upon an appointment to an office relating to the adminiſtration of juſtice in *Jamaica* Lord *Thurlow* ſaid, the diſcretion of the Crown was to be exerciſed for the benefit of the public; and aſked, how it can be beneficial to the public, that there ſhould be a truſt of ſuch an office. His Lordſhip added, that he never would adviſe the King to do ſo. The only caſe is *Bellamy* v. *Burrow*; and that is a very ſlight authority. It is impoſſible, that a man, who will make this proviſion, can be equally fit, unleſs the emoluments are too large. Can it be ſaid, this is an office, in which the public are not materially intereſted, both with reſpect to paſſengers and letters.

(a) *Amb.* 432.

July 22. 1799.

Upon the adminiſtration of aſſets no queſtion ought to be determined in Equity, till it is determined, whether there is a good debt at law.

Maſter of the Rolls—I intimated my wiſh, that the parties would make up this cauſe. I can only ſay now, as I ſaid, when it was argued, that it is impoſſible for me to decide it, till they make good their title at law. If the bond is good, the relief is of courſe. It entirely depends upon the point, whether the bond is good at law, or not. It was contended, that it is of ſuch a nature, that this Court will condemn it at all events. I always was of opinion, that as to bills for the adminiſtration of aſſets no queſtion, that can ariſe, ought to be determined here, until it has been determined, whether there is a good debt at law. If this bond was obligatory upon the obligor, it is upon his aſſets; if not obligatory upon him, it is not upon his aſſets. The account is conſequential, and only conſequential. The queſtion is, whether I ſhould at once diſmiſs the bill, and with coſts. I certainly ſhall not diſmiſs it with coſts, between ſuch parties, and in ſuch a caſe. I think, the bill muſt be retained, with liberty to the plaintiff to proceed at law.

Sale (by the owner) of the command of a ſhip in the ſervice of the *Eaſt India* Company without their knowledge is illegal, and cannot be the ſubject of an action.

Sale of a commiſſion in the army is not bad of itſelf: ſale of a public office or any obligation to be made good out of that is ſo.

The caſe of *Blachford* v. *Preſton* (*a*) is analogous to this. It was there determined, that a ſale by the owner of the command of a ſhip employed in the ſervice of the *Eaſt India* Company, being without the conſent or knowledge of the Company, was illegal; and ſuch a contract could not be the ſubject of an action? But the Court did not determine, that any obligation entered into with the privity of any of the perſons authoriſed by His Majeſty to make the appointment is illegal. It has been determined, that the ſale of a Commiſſion in the army is not bad in itſelf; and that a ſale of a public office, or any obligation to be made good out of that, unqueſtionably would be ſo. Mr. Juſtice *Lawrence* there ſtates the caſe of *Parſons* v. *Thompſon*; and particularly, that the agreement was without the knowledge of the Navy Board. I have therefore no ſcruple in ſaying, that if ſuch a contract is made for a ſum of money, in conſideration of the appointment to ſuch a command as this, between individuals, and it is not completely with the knowledge of the Poſt-Maſter General, it is void. I have an opinion upon it, even though it ſhould be proved to be done, as

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(*a*) 8 *Term Rep. B. R.* 89.

the condition purports, with that approbation in ſome degree. But when this doubt is thrown out by the Judges, it is too much for me, whatever my own opinion may be, which I certainly do entertain, to decide, that this is not a good legal bond. Therefore I can only leave them to bring an action; and if it is not brought, the bill muſt be diſmiſſed.

One part of the condition is ſtrange: that is, the claim to this annuity during the whole life of the mother, though the ſubject is gone. It is not an annuity out of the profits, but an abſolute annuity during the life of the mother, whether *Edward Hartwell* continued in the command, or not. It can hardly be inforced to that extent. That would be a monſtrous thing to inſiſt upon. It muſt have been a miſtake. They could not mean it.

TAIT *v.* LORD NORTHWICK.

July 23.

A proviſion by will for payment of intereſt of debts, held not to extend to a debt by ſimple contract.

The perſonal eſtate is the natural fund for the debts; and can only be exempted by the intention to exempt it expreſſed in the will: a charge upon real eſtate, however anxious, is not of itſelf ſufficient.

BY indentures of leaſe and releaſe, dated the 16th and 17th of *October* 1787, ſeveral real eſtates in the county of *Denbigh*, of which *Richard Myddleton* Eſq. was ſeiſed in fee, and other eſtates in the ſame county, which were in ſettlement, were conveyed to truſtees upon various truſts for the payment of debts; and, ſubject thereto, to the uſe of Mr. *Myddleton* for life; remainder to truſtees to preſerve contingent remainders; remainder, ſubject to a term for ſecuring a jointure and portions, to the joint appointment of Mr. *Myddleton* and his ſon; and in default thereof to the appointment of the ſon, if he ſhould ſurvive; and in default of ſuch appointment to the ſon in tail male; with remainders over (*a*).

Mr. *Myddleton* the younger, having ſurvived his father, and no joint appointment having been executed, by his will, dated the 20th of *June* 1795, duly executed for paſſing real eſtate, reciting his power of appointment; and that he had at various times borrowed and taken up of different perſons divers ſums of money upon his bond and otherwiſe; and that he alſo ſtood indebted unto various perſons in divers ſums of money by ſimple contract; and that he had ſince the execution of the conveyance of *October* 1787

(*a*) See the deed particularly ſtated in *Myddleton* v. *Lord Kenyon*, *ante*, vol. 2. 391.

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purchaſed certain eſtates in the county of *Denbigh*, and had borrowed or taken up money upon mortgage or otherwiſe for the payment of the purchaſe money; and farther reciting, that he was deſirous of making a proviſion as well for the payment and diſcharge of the money borrowed and taken up for the purchaſe of the ſaid ſeveral eſtates and all intereſt and arrears of intereſt thereof, as alſo for the payment of all ſuch other debts and ſums of money, as he ſhould owe at the time of his death to any perſon whomſoever, not then already provided for by the indentures before mentioned, and alſo to ſettle and aſſure the ſaid ſeveral eſtates purchaſed by him to the ſame uſes as the eſtates compriſed in the conveyance of *October* 1787, he deviſed all the manors, meſſuages, lands, *&c.*, which he had ſo purchaſed or agreed to purchaſe, to the uſe of Lord *Kenyon*, Lord *Northwick*, Sir *William Pulteney*, Bart. and *William Lloyd*, Eſq., upon ſuch and the like truſts, and to and for the ſame ends, intents, and purpoſes, and ſubject to the like powers, proviſoes and conditions, in all reſpects, as the eſtates compriſed in the ſaid conveyance did thereby or by his will and the directions, declarations, limitations, and appointments, hereinafter contained, ſhould ſtand limited or appointed; and in purſuance of his power under the ſaid indentures he appointed, that the eſtates thereby conveyed to the ſaid truſtees, or ſuch parts thereof as ſhould not be ſold under the ſaid indentures, and the equity of redemption, reverſion or inheritance, of ſuch part or parts thereof as ſhould then be, or ſhould hereafter be, mortgaged, with their appurtenances, ſubject to the truſts created by the ſaid indentures for raiſing and the payment of the debts, incumbrances, and ſums of money, provided for and directed to be raiſed by ſuch indentures, ſhould, together with the ſaid hereditaments and premiſes by the teſtator purchaſed, and by his will deviſed, as aforeſaid, remain and continue to the uſe of, and be veſted in, the ſaid truſtees, their heirs and aſſigns, upon the truſts hereinafter mentioned: *viz.* upon truſt by abſolute ſale or mortgage thereof or of any part thereof, as to them, the ſaid truſtees, ſhould ſeem requiſite and proper, or by ſale of timber thereon, or by ſuch other ways and means as to them ſhould ſeem requiſite and proper, to raiſe ſuch ſum or ſums of money as ſhould be requiſite to pay and diſcharge the ſaid ſeveral ſums of money borrowed or taken up at intereſt, or advanced by Sir *William Pulteney*, as therein mentioned, and all ſuch other debts and ſums of money as the teſtator ſhould at the time of his death owe to any perſon or perſons whomſoever by mortgage, bond or other ſpecialty, or by ſimple contract, or otherwiſe howſoever, and all intereſt thereof; and upon farther truſt from time to time out of the rents of the ſame eſtates to pay the intereſt of ſuch ſums of money as ſhould be borrowed, and to retain in their hands ſo much of the clear reſidue of the rents and profits, as to them ſhould ſeem meet, in the nature of a fund to be applied in and towards reducing the principal of the ſaid ſeveral debts or ſums of money; and he declared it to be his will, and appointed, that, after payment, as well of the ſaid ſeveral debts thereby directed to be paid, as of all ſuch ſums of money as ſhould be ſo borrowed and the intereſt thereof reſpectively, and all coſts attending the execution of the truſts thereby created, the truſtees ſhould convey all the ſaid eſtates, as well thoſe purchaſed by the teſtator as thoſe compriſed in the ſaid indentures of *October* 1787, or ſuch parts thereof reſpectively as ſhould not have been ſold or diſpoſed of, and the equity of redemption of ſuch parts thereof as ſhould have been mortgaged, to the uſes and upon the truſts by the ſaid indentures declared and limited of and concerned the eſtates compriſed therein, after payment and diſcharge of the ſums of money, debts, and incumbrances, thereby directed to be raiſed and paid thereout, or ſuch of them as ſhould be then exiſting and capable of taking effect. The teſtator then after giving to each of his truſtees a legacy of 100*l.* gave all the reſt, reſidue and remainder, of his perſonal eſtate whatſoever and whereſoever, and of whatſoever nature and kind, to his two ſiſters *Charlotte Myddleton* and *Maria Myddleton*, equally to be divided between them, for their own uſe abſolutely, and he appointed Lord *Northwick* and Sir *William Pulteney* executors of his will.

The teſtator died in *December* 1796. *Maria Myddleton*, who married *Frederick Weſt*, and *Charlotte Myddleton*, the teſtator's ſiſters of the whole blood, and *Harriet Myddleton*, his ſiſter of the half blood, ſurvived him, and were his next of kin according to the *Statute of Diſtributions* (*a*).

The bill was filed by a creditor by ſimple contract, an upholſterer, claiming a debt of 1777*l.* 10*s.* 11*d.* The decree

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(*a*) 22 & 23 *Char.* 2. *c.* 10. 29 *Char.* 2. *c.* 3.

pronounced upon the 4th of *Auguſt* 1795 directed an account of the debts and funeral expences of the teſtator; and that the Maſter ſhould compute intereſt upon ſuch of the debts as carried intereſt. An account of the teſtator's perſonal eſtate was alſo directed; and it was ordered, that the perſonal eſtate ſhould be applied in payment of what was due to the plaintiff and all other the creditors of the teſtator, and of his funeral expences, *&c.*, in a courſe of adminiſtration; and that the reſidue ſhould be paid into the Bank, *&c.*

An exception was taken to the Maſter's Report by the Plaintiff for not allowing intereſt upon his debt.

The cauſe coming on at the ſame time for further directions, another queſtion aroſe; whether under the teſtator's will his perſonal eſtate was exempted from the payment of his debts.

Mr. Richards and Mr. Stanley for the Plaintiff contended in ſupport of the exception, that the proviſion for payment of intereſt muſt apply generally to all the debts the teſtator might owe, obſerving, that as to debts, which in their nature carry intereſt, it was unneceſſary.

The Counſel for the defendants in ſupport of the Report were ſtopped by the Court.

The Solicitor General, Mr. Graham, and Mr. Alexander, for the defendants, Mr. and Mrs. Weſt and Charlotte Myddleton—With reſpect to the queſtion as to the exoneration of the perſonal eſtate; there are a great many caſes upon that point. Thus much has been determined; that it is not neceſſary to find in the will preciſe and ſpecial words of exemption; but it is ſufficient, if the intention can be collected from the whole to give the perſonal eſtate exempt from the debts. In this will there is an anxious creation of a fund, to ariſe from the real eſtate, for payment of all debts; and the perſonal eſtate is to be divided between theſe two ſiſters. The teſtator recites the conveyance of 1787; one principal object of which was to pay debts due both by himſelf and his father. After that recital he makes a proviſion, as well for the diſcharge of the money borrowed for the purchaſe of eſtates, and all intereſt thereof, as of all other debts he might owe at the time of his

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death; providing for every deſcription of debt. He then deviſes his real eſtate, upon particular truſts for the payment of his debts; upon which it is to be obſerved, firſt, that it is not a mere charge, but a deviſe for the purpoſe of an abſolute ſale for the payment of the whole of his debts. That has been much relied upon in ſome old caſes; where it is ſtated, that from a mere charge the preſumption does not ariſe, as, where the eſtate is to be ſold out and out. I admit, that in ſome caſes that circumſtance alone has not been conſidered ſufficient to exonerate the perſonal eſtate: but if a clear intention appears to make the real eſtate the proper fund, that is ſufficient. If that is not the conſtruction upon this will, the diſpoſition in favour of theſe ſiſters will be completely diſappointed; for the perſonal eſtate will be exhauſted. It is obvious upon the will itſelf, that the debts are large; and that the teſtator thought, a great part of the real eſtate muſt be appropriated to the diſcharge of them. He gives the whole of his perſonal eſtate except ſome ſmall legacies to theſe ſiſters for their own uſe abſolutely. There are ſeveral caſes upon this ſubject in point, determined in the year 1796 (*a*); in which all the caſes are referred to. The reſult of them all is what I have ſtated; that the intention is to be collected from the whole will. Your Lordſhip in *Gray* v. *Minnethorpe* and the Maſter of the Rolls in *Burton* v. *Knowlton* and *Brummel* v. *Prothero* adopt the rule previouſly laid down by Lord *Kenyon* in *Webb* v. *Jones* (*b*). In *Gray* v. *Minnethorpe* your Lordſhip held, that a direction to ſell and pay the debts, without any diſpoſition of the perſonal eſtate farther than by the appointment of an executor, was not ſufficient. This will ſhews an evident intention in favour of theſe reſiduary legatees; particularly from all thoſe anxious directions as to the debts, before the teſtator proceeds to the diſpoſition of the perſonal eſtate. In *Burton* v. *Knowlton* and *Brummel* v. *Prothero* the Maſter of the Rolls does not admit, that there muſt be an irreſiſtible inference; and ſays, he does not know, what is meant by that. That expreſſion eſcaped Lord *Thurlow* in more inſtances than one. The Maſter of the Rolls has explained it thus; that implied intention, that leaves no reaſonable doubt in a well informed mind.

Is there any fair ground for doubting the intention in this caſe, even upon the will; for, if we go out of the will, it is im-

(*a*) *Gray* v. *Minnethorpe, ante*, vol. 3. 103. and the three following caſes. (*b*) 2 *Bro. C. C.* 60.

poſſible to doubt it? It is true, the teſtator has not given any direction for the payment of his funeral expences out of his real eſtate. That is a ſlight circumſtance, and thoſe caſes which required that circumſtance, muſt have afforded but little evidence of intention. Upon this will the inference is ſtrong. The minute circumſtance of the probate and the funeral expences did not occur to him, when conſidering the large debts, for the diſcharge of which he and his father had been ſo anxious. He recites the conveyance for that purpoſe. He takes up the ſame idea, when making his will. Even the rents and profits of the newly acquired eſtates are to go towards the diſcharge of the debts. In following up that deſign he never makes any mention of his perſonal eſtate. Only two of the truſtees are executors. Having diſpoſed of the truſt eſtate he takes up a diſtinct ſubject; and in that reſpect it is very like *Thorn* v. *Lord* upon Mr. *Selby*'s will; where it was held, that the teſtator had treated the perſonal eſtate as a diſtinct ſubject, independent of the real eſtate; and therefore the perſonal eſtate was held to be given as a ſpecific reſidue, deducting only ſome legacies given out of it. This is clearly a ſpecial reſidue; which he has given to his two ſiſters of the whole blood. What is meant by the word "*abſolutely*" but, diſcharged from debts? The teſtator very particularly ſpecifies the debts he had contracted himſelf for the purchaſe of eſtates. Another circumſtance, upon which the Court has acted, is the ſtate of the property. In ſome old caſes, at a time when the preſumption was in favor of the perſonal eſtate, the deciſion has been upon the circumſtance, that the perſonal eſtate was ſmall. That however has not been ſo conſidered lately.

The LORD CHANCELLOR obſerved, that the truſtees have no power to throw the funeral expences and the probate upon the real eſtate; and aſked, whether the perſonal eſtate could be charged with thoſe expences and not be charged with the debts.

The Attorney General for the defendant Harriet Myddleton, the teſtator's ſiſter of the half blood—The rule is clear, and not to be controverted; that wherever the perſonal eſtate is exempt from the debts, it muſt be taken as a ſpecific legacy: if not, it cannot without expreſs words be exempt. Lord *Thurlow*'s doctrine in *The Duke of Ancaſter* v. *Mayer* (*a*) is perfectly correct. Your Lordſhip

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(*a*) 1 *Bro. C. C.* 454.

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muſt overturn a number of caſes, if you hold this will ſufficient to raiſe the preſumption. The expreſſion, "to raiſe ſuch ſum "or ſums as ſhall be requiſite," that is, for which there is no other fund, excludes the preſumption, unleſs there are ſtrong words the other way. In the caſe of maintenance of children, where there is a direction, that the intereſt ſhall be applied to the maintenance, that is qualified by the ſituation of the child: it is to be applied, if requiſite: but not, where it would be a gift to the father, otherwiſe bound to maintain the child (*a*). In all caſes of that ſort the fund is provided only in caſe the primary fund is not applicable. The ſubſequent direction in this will ſhews, the teſtator was anxious, that the real eſtate ſhould not be burthened more than was neceſſary; for he directs a ſinking fund to be created in order to prevent that. There is nothing in the diſpoſition of the perſonal eſtate to raiſe the preſumption. It is clear, the teſtator has not given all to theſe ſiſters abſolutely except what was neceſſary for the legacies; for, as your Lordſhip obſerves, he certainly meant his funeral expences and the charges of the probate to come out of the perſonal eſtate; and the contrary is not contended. What ground is there for exempting the perſonal eſtate from the debts any more than from thoſe charges? The only ground is, that he has charged his real eſtate with debts. Then it comes preciſely to the queſtion, whether a charge is ſufficient. It is impoſſible to argue it ſo without deſtroying the ground, upon which the preſumption is raiſed. If the real eſtate had been charged with the funeral and teſtamentary expences, there might have been a ground for the argument. The legacies clearly are to be paid out of the perſonal eſtate. The mere aſſent of the executors cannot be ſufficient to veſt this in the legatees; which is the characteriſtic of a ſpecific legacy: but the executors would receive the perſonal eſtate, and convert into money as much as is neceſſary for the legacies and funeral expences; and the ſurplus only, after theſe charges are taken out of it, is to be handed over to theſe ſiſters.

The deciſions are extremely ſtrong. In *The Duke of Ancaſter v. Mayer*, the caſe, in which Lord *Thurlow* differed from the prior deciſion, there were very ſtrong words, which were not held ſufficient. In *Stephenſon v. Heathcote* (*b*) before Lord *Northing-*

(*a*) See *Andrews* v. *Partington*, 3 *Bro. C. C.* 60. *Mundy* v. *Earl Howe*, 4 *Bro. C. C.* 228. *Hoſte* v. *Pratt*, *ante*, vol. 3. 730.

(*b*) Stated in *The Duke of Ancaſter* v. *Mayer*.

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ton, the teſtator deviſed all his real eſtate, with a charge thereon for payment of debts: he then gave a ſilver tobacco-box to his uncle, and ſome other things; and he gave all the reſidue of his perſonal eſtate to his wife for ever, and appointed her ſole executrix. It was inſiſted, that the perſonal eſtate was exonerated: but it was held not to be exempted, upon the ground your Lordſhip has ſuggeſted, that it could not poſſibly be exempted from the funeral expences and teſtamentary expences. Suppoſe, the teſtator had made a codicil giving legacies: how would thoſe legacies be paid? It is ſaid to be a gift of all the reſidue of the perſonal eſtate; taking out only the legacies given by the will. Nothing is ſaid as to legacies by a future codicil. The Court could never hold, that theſe words would exclude thoſe ſubſequent legacies. In *Burton* v. *Knowlton* there were particular expreſſions in the will, upon which the Maſter of the Rolls relied. I do not enter into the diſcuſſion, whether that caſe is not open to a good deal of obſervation. But in *Brummel* v. *Prothero* the deciſion is the other way. In that caſe the charge was of all debts: in this it is only what may be requiſite. In that no legacy was given; and the diſpoſition of the perſonal eſtate had more of the nature of a ſpecific legacy than this can be ſaid to have. In *Burton* v. *Knowlton* alſo the Maſter of the Rolls approved the caſe of *The Duke of Ancaſter* v. *Mayer*; and did not mean to decide againſt that caſe, or to expreſs a diſapprobation of anything except the expreſſion "*irreſiſtible inference*," as being too ſtrong.

Mr. Piggott on the ſame ſide was ſtopped by the Court.

LORD CHANCELLOR—As to the point upon the Exception, I do not ſee, how it goes out of the common courſe. Theſe words do not go to raiſe a charge of intereſt beyond what the nature of the debt would carry. Upon ſuch a debt too the claim of intereſt is ſingular. From what period is it to commence?

With reſpect to the other point, I did not think, there had been any caſe ſo near the argument contended for by the two ſiſters as *Burton* v. *Knowlton*. But I confeſs, I had held a firm opinion, that the doctrine is exactly, as it was laid down in *The Duke of Ancaſter* v. *Mayer*. I take the rule at preſent to be, that the perſonal eſtate is the natural fund; that againſt the charges naturally thrown upon the perſonal eſtate you may ſhew a diſtinct exemption: or from the whole will you may collect, that there is an intention expreſſed in the will (I do not mean *in totidem verbis*) that the perſonal eſtate ſhall be exempt. Then charging the real eſtate ever ſo anxiouſly for payment of debts will not of itſelf be ſufficient to exempt the perſonal eſtate. I ſet the whole doctrine afloat, if the argument for the two ſiſters upon this will is allowed to prevail; for it only comes to this. There are two circumſtances; one, that there is a gift of reſidue of the perſonal eſtate: another, that there is a very anxious charge of debts upon the real eſtate. Beyond that I have no ground to ſtand upon. All the reſt of the circumſtances are merely conjectural, upon a ſuppoſed intention; and it is aſked, what could the teſtator mean by giving theſe ſiſters his perſonal eſtate, if they get nothing by it. All I ſay to that is, that a man giving the reſidue of his perſonal eſtate does not in general mean much. It is, as it may happen.

The decree was made accordingly; and the exception was over-ruled.

LAW *v.* THE EAST-INDIA COMPANY.

Rolls, July 24.

A ſurety to the *Eaſt-India* Company diſcharged by payment of a balance to the principal under an erroneous ſettlement by the officers of the Company without their authority or knowledge.

The *Eaſt India* Company having compelled payment from a ſurety in *India* by their power over him, as one of their ſervants, without an account or proceeding againſt the principal, (though ſolvent) and otherwiſe under harſh circumſtances, he was reſtored to the ſame ſituation by a decree for repayment with intereſt at 5 *per cent.* upon giving ſecurity for repayment, in caſe in a future ſuit by the Company he ſhould be held liable. The Court would not upon the circumſtances give *Indian* intereſt.

WILLIAM *TIERNEY* Eſq. was appointed by *The Eaſt-India Company* paymaſter of the detachment of *Bengal* troops in the *Carnatic*; and in purſuance of a late reſolution of the Company, requiring ſureties for ſuch officers, *William Tierney*, *Thomas Law*, and *Henry Vanſittart*, executed a bond, dated the 14th of *October* 1780, whereby they became jointly and ſeverally bound to the Company in the penal ſum of 200,000 ſicca rupees, for the good behaviour of *William Tierney* in the office; with condition to be void, if he ſhould duly account for all money, which ſhould be received, laid out or expended, by him on account of the Company.

In *September* 1783 *William Tierney* died inteſtate at *Calcutta*. *Thomas Graham* procured adminiſtration to him in *India*. Some time after his death a claim was made by the Company of 689,729 current rupees, as due from Mr. *Tierney* upon the balance of his accounts as military paymaſter. This demand was diſputed by *Graham:* but no notice whatever was given to the ſureties. Upon a farther inveſtigation of the accounts in 1786 it appeared, that the claim of the Company did not amount to 200,000 current rupees. The debt had not been reduced by any ſubſequent payments. Upon farther examination by the military Paymaſter-general in 1787 it appeared to him, that there was no foundation for the claim of the Company; on the contrary, that a balance was due from the Company to the eſtate of Mr. *Tierney* of 50,548 current rupees; and that balance being reported by the military Paymaſter-general to the Governor-general and Council to be due was ſhortly afterwards paid on behalf of the Company to *Graham.* The bond was not delivered up, but remained in the cuſtody of the ſervants of the Company. After the payment of that balance *Graham* remitted, through the Treaſury of the Company, the effects of Mr. *Tierney* to his brother *George Tierney* Eſq. in *England;* who procured adminiſtration.

In 1787 Mr. *Vanſittart* died at *Calcutta.* His widow and executrix paid his debts in *India* out of his effects, and having remitted the ſurplus to the executors in *England* ſoon afterwards returned to *England.*

Mr. *Law* continued many years in *India* in the ſervice of the Company; and was during a conſiderable part of that time a Member of the Board of Revenue at *Bengal.* In 1790 being adviſed, that it was neceſſary for his health, he applied for leave to quit *India.* His health continuing to decline he was adviſed, that it was abſolutely neceſſary to ſail without delay. Therefore early in *January* 1791 he renewed his application to the Governor-General in Council through the medium of the Board of Revenue for permiſſion to reſign and depart for *England.* He complied with the regulations for that purpoſe; and procured *Edmond Morris* to become ſurety for all ſums of money, that might be due from him to the Company on account of the Civil Auditor's Department; and the Board of Revenue certified, that they approved the ſecurity; and they deſired the Civil Auditors to grant the certificate required; which was approved by the Governor-General, or the perſons exercifing the powers in his abſence.

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Mr. *Law* then took his paſſage on board the *William Pitt.* Upon the 21ſt of *January* 1791, when that ſhip was under diſpatch, the Members of the Council in the abſence of Lord *Cornwallis*, upon the ground, that a claim was ſtill ſubſiſting on behalf of the Company againſt *William Tierney*'s eſtate to the amount of 100,000 rupees, came to a reſolution, that Mr. *Law* ſhould have permiſſion to reſign and proceed to *Europe* only on his giving ſufficient ſecurity for the claims upon him in the Military Department on account of the retrenchment againſt Mr. *Tierney*. At that time there were only two Members of the Government in Council: the Preſident left by Lord *Cornwallis* being abſent from illneſs. No Council Board could be held between the date of that reſolution and the ſailing of the ſhip; and the reſolution was communicated to Mr. *Law* through the Revenue Board on the 25th of *January;* which was only four days before the ſailing of the ſhip. Till that reſolution he had no notice whatever of any claim. No other ſhip except the *William Pitt* was to ſail for *Europe;* and the ſtate of his health made it extremely dangerous for him to defer his departure. Under theſe circumſtances in order to find ſureties he was under the neceſſity of depoſiting in the hands of *Edmond Morris* and *Lyon Prager* 100,000 current rupees; upon which they became ſecurity for the payment of what ſhould appear due from him to the Company on account of the retrenchment againſt Mr. *Tierney*. Upon the 30th of *January* Mr. *Law* ſailed.

In 1792 *Morris* and *Prager* received a letter from the Attorney of the Company; ſtating, that there was a balance of 96,857 current rupees 7 annas 2 pice due from Mr. *Tierney* as Paymaſter; that *Graham* had refuſed to pay; and that unleſs the whole demand was paid by them within two days, he had orders to proceed againſt them. Upon this they applied to *Graham* to know, whether he would authoriſe them to pay, or whether they ſhould ſtand a ſuit; which they offered to do, if he would undertake the direction of the defence and indemnify them. *Graham*'s anſwer was, that he had taken every ſtep to induce the Governor and Council to make ſeveral retrenchments in this demand; but that they would not allow any farther abatement; and as he had not ſufficient aſſets to ſatisfy the demand, they would as ſureties for Mr. *Law* judge, how far under the objections he had ſtated it would be adviſeable unconditionally to pay the balance demanded;

and doubting, as he did, of the ſufficiency of the grounds, upon which the Governor and Council had ſet aſide his objections, he did not think, he ſhould be juſtified in authoriſing them to ſtand a ſuit: nor could he undertake the defence of ſuch ſuit, nor defray the expence of it. He then ſuggeſted, that, conſidering the circumſtances, under which the balance has ariſen, Government ought to be ſatisfied with their depoſiting ſecurity for the amount demanded, to be appropriated to the liquidation of ſuch part thereof as may ultimately be judged juſtly due from the eſtate upon a reference of the points in diſpute to the Court of Directors; to whom in juſtice to the heirs of the eſtate as well as to the ſecurities he deemed himſelf bound to ſubmit them.

Theſe terms propoſed by Mr. *Graham* were not accepted by the Company; upon which *Morris* and *Prager* paid the ſum demanded; which was compoſed of the ſum of 46,309 rupees, ſtated to be due from Mr. *Tierney*, and the ſum of 50,548 rupees, which had been paid to *Graham* by the Company. *George Tierney* refuſed to pay Mr. *Law* in reſpect of what had been ſo paid to the Company. The Court of Directors upon the 3d of *September* 1794 came to a reſolution, under which the Company offered to pay the ſum laſt mentioned, computing the rupee at 1 *s.* 11 *d.*, to *Graham* with intereſt at 5 *per cent.* (which ſum was recited to have been paid erroneouſly and without the authority of Government) upon condition, that the legal repreſentatives of *William Tierney* and Mr. *Law*, and the legal repreſentatives of Mr. *Vanſittart*, would execute an agreement, that they would admit a copy of the bond tranſmitted to the Court by Mr. *Law* as the bond entered into by Mr. *Tierney* and his ſureties, and ſign ſuch admiſſion, and admit the bond as a ſubſiſting bond; and that they ſhould not in any action or ſuit to be brought thereon by the Company avail themſelves or any of them of the payment made by *Law* or on his account of the ſaid 50,548 current rupees; and that they ſhould appear to any action or ſuit brought by the Company upon the bond in the Supreme Court of *Bengal*; and that the farther ſum of 46,309 current rupees, likewiſe paid by *Law*'s attornies, be retained by the Company; the ſame appearing to be due from *William Tierney*; and that proper proceedings be had in the Supreme Court at *Bengal* to recover the ſum of 50,548 current rupees, under the above reſolution paid to Mr. *Law*, from the repreſentatives of *William Tierney*.

Thomas Graham ſtill continued in *India*.

Under theſe circumſtances the bill was filed by Mr. *Law* praying, that the *Eaſt-India* Company may repay to the plaintiff the ſum of 10,492 *l*, being the value of 96,857 rupees 7 annas and a pice, with *Indian* intereſt; or, if the Court ſhall be of opinion, that the whole ought not to be repaid, that they may repay 5476 *l.* the value of 50,548 rupees, the ſum paid to *Graham*, with *Indian* intereſt; and that the defendant *Gorge Tierney* may pay the plaintiff the reſidue of the ſaid 10,492 *l.*; the ſame having been paid to the Company by *Morris* and *Prager* under the direction of *Graham*; or, if the Court ſhall be of opinion, that the ſame ought not to be repaid, till the account between the Company and *William Tierney* ſhall be finally ſettled, that the account may be taken, and the balance aſcertained; that the Company may pay the plaintiff ſuch ſum of money as it ſhall appear they have been paid by *Morris* and *Prager* more than the real balance due, with *Indian* intereſt; that the defendant *Tierney* may pay the plaintiff the balance really due from *William Tierney* to the Company, with intereſt, as above; and that the bond may be delivered up.

Upon the ſuppoſition, that *Tierney*'s aſſets ſhould prove deficient, the bill prayed an account of the aſſets of Mr. *Vanſittart*, as co-ſurety with the plaintiff, and payment of a moiety of the ſum paid by the plaintiff in diſcharge of the balance due from *William Tierney*. But there was no queſtion of Mr. *Tierney*'s ſolvency.

The bill ſtated, that the ſureties having had no notice of any claim of debt, and not having been appriſed of any of the ſaid tranſactions, did not apply to have the bond delivered up.

The *Eaſt-India Company* in their anſwer ſet up a claim of intereſt upon the money due from *Tierney*. They ſtated, that the payment made by their officers to the repreſentative of Mr. *Tierney* in *India* was made without their authority or knowledge.

The defendant *Tierney* by his anſwer admitted aſſets; and ſtated, that being ignorant of the circumſtances and ſtate of the account he refuſes to pay. He alſo diſputed the claim of intereſt by the Company.

1799.

Law
v.
The East
India
Company.

July 24.

This cauſe having been argued at great length ſtood for judgment.

Maſter of the Rolls—This cauſe has ſtood a conſiderable time for judgment; being attended with many very peculiar circumſtances, and involving a great number of tranſactions, which it was neceſſary to conſider very fully, and a great variety of evidence, upon which without a full examination and weighing it very minutely it was impoſſible to decide. It would take up too much time to ſtate all the evidence, and every part of it, that affords ſome ground for the determination I ſhall make. Therefore I ſhall only ſtate the leading points.

There is no doubt, that Mr. *Tierney* died perfectly ſolvent. Every thing remaining to be done at his death was to ſettle the account between him and the Company; and ſteps were taken by the officers of the Company; and an adminiſtration was taken ſoon after his death. No final ſettlement took place: but the account was going on. In 1785 a demand was made againſt his adminiſtrator of ſo great a ſum as 689,729 rupees. This demand was reſiſted: but no notice was given to the ſureties. In the ſubſequent year this ſuppoſed balance was reduced to leſs than 200,000 rupees; and in 1787 according to the Paymaſter's account the balance was the other way. In the ſame year a very important tranſaction took place, at leaſt with regard to the ſureties. The officers of the Company, as they ſay, without their concurrence, and againſt their conſent undoubtedly, if any thing remained due from him, allowed the balance ſtated to be due to him; and paid the adminiſtrator 50,548 rupees. There is ſome difference as to the ſum in the bill and in the anſwer. Nothing is more clear than, whether that was done with the conſent and by the orders of the Company, or not, but ignorantly by their officers, it was as to the two ſureties a complete diſcharge. It cannot be contended upon any principle, that prevails with regard to principal and ſurety, that, where the principal has left a ſufficient fund in the hands of the obligee, and he thinks fit inſtead of retaining it in his hands to pay it back to the principal, the ſurety can ever be called upon. This payment therefore or permitting that part of the aſſets to be paid back to the adminiſtrator of the principal by the officers of the Company

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Company, whether with their conſent or ignorantly, is a complete diſcharge of the two ſureties.

In the ſame year 1787, no demand having been made upon Mr. *Vanſittart*, the co-ſurety with the plaintiff Mr. *Tierney*, his aſſets in the hands of the Company were remitted to *Europe*; and Mr. *Tierney*'s adminiſtrator alſo with the full knowledge of the Company, and this account going on, unliquidated and unſettled, was permitted to remit great part, as the defendant *Tierney* ſays, the whole, of his aſſets through the Company's treaſury to *Europe*. No demand is either proved or inſinuated down to the year 1791. In this time, it is true, a great many tranſactions took place between Mr. *Graham* and the Company's officers. There were great diſputes about the balance really due; and they differed widely upon it. But in 1791 according to the Company's officers it amounted to 100,000 rupees; and was afterwards reduced to 96,857 rupees, 7 annas, 2 pice. No notice was given to, or demand made upon, the ſureties till the 21ſt of *January* 1791; when the plaintiff having complied with the uſual requiſites, under a very reaſonable rule, that the ſervants of the Company ſhall, before they return to *Europe*, give ſecurity to anſwer any demand the Company may have upon them, and thinking that the only requiſite, that could be demanded of him, was ſurpriſed to find this demand ſet up againſt him. He remonſtrated, and complained very much of it, as a ſevere hardſhip upon him, that the demand ſhould be made at all, much leſs at ſuch a time, when he was bound to *England* in a very bad ſtate of health, and it was abſolutely neceſſary to take an immediate departure. He could not, meaning to take all his effects with him, find ſureties without leaving a depoſit to indemnify them. He was however, as the Company inſiſted upon it, to find ſureties; and he left 100,000 rupees with *Prager* and *Morris* for this purpoſe, and ſailed for *England*. The balance demanded of him, which was then ſtated at 100,000 rupees, was not admitted by *Graham*, but was then and continued to be conteſted by him.

But notwithſtanding this, and their having got this ſecurity, it would have been but fairneſs in the Company not to have proceeded againſt Mr. *Law*; who and whoſe ſureties knew nothing of the matter; but to have proceeded againſt *Graham*, the only principal in Equity, and the only perſon, who could make any defence whatſoever. Making great allowances for perſons acting in public truſts, and, I muſt ſay, perſons, who do not deſerve to hear ſo much as has been ſaid of them in this cauſe, I feel no difficulty in ſaying, that between individuals that would have been a very harſh proceeding, and much more, to ſkip over the principal, and leaving him, whom they had permitted to ſend over the aſſets, *per ſaltum* reſort to the ſurety. In 1792 the plaintiff's ſureties were called upon to pay 96,857 rupees, 7 annas 2 pice, then ſtated as the balance. *Graham* refuſed to pay. Inſtead of proceeding againſt him to liquidate the demand by action of law, though that would have been a very inſufficient mode, or by bill in Equity, and calling upon the ſurety only for the deficiency, they directly, *Graham* not paying, make the demand upon the ſureties of Mr. *Law*, and actually inſiſt, that they ſhall pay the money in two days; declaring, that, if it is not paid in that time, proceſs ſhall iſſue againſt them. Between individuals that would be thought a very harſh proceeding. I am not ſure, that what they have done has not operated to a complete diſcharge of the ſurety: but upon that it would be improper to give any opinion; for that would be the ſubject of another ſuit; which may be brought hereafter. The ſituation of Mr. *Law*'s ſureties was, that they had 100,000 rupees of his in their hands as an indemnity. They applied to *Graham* to defend the ſuit. He refuſed. He certainly did very wrong in that. He ought to have defended it. He ſtated what he ſuppoſed to be the juſtice of the caſe; and gave his reaſons; that he had been permitted by the Company to tranſmit to *England* all the aſſets; and had not aſſets ſufficient to enable him to liquidate the account: therefore he could not indemnify them, or take any ſteps, that would be a ſufficient indemnification; and he left it to their prudence; ſuggeſting only, that it would be imprudent in them unconditionally to pay this ſum of money. Nothing however would ſatisfy the Company but immediate payment. The ſureties of Mr. *Law* therefore having only that ſum in their hands, and being afraid to defend a ſuit, of which they could not have a knowledge, for the ſuit ought to have been brought againſt *Graham*, ſubmitted, and paid the money. After this Mr. *Law* being in this Country applied to the Company; and a great deal of negotiation and many propoſals for an accommodation enſued; in the courſe of which *Law* demanded a repayment *in toto*, or at leaſt to the extent of the 50,548 rupees;

the payment of which on the part of the Company undoubtedly did operate as a diſcharge of the ſureties for the reaſons I have given. The Company offered to repay that ſum with *Engliſh* intereſt, computing the rupee at a price, to which, I ſuppoſe no objection is made. But that offer was accompanied with this condition, that he and the repreſentatives of Mr. *Tierney* and Mr. *Vanſittart* ſhould execute an agreement to admit a copy of the bond, and that they ſhould not avail themſelves of the payment made on account of *Law* of the 50,548 rupees; and that they ſhould appear to any ſuit brought by the Company in *India*. Mr. *Law* anſwered, that he had no means but by a bill in this court to compel Mr. *Tierney* to ſubmit to theſe terms; upon which this bill was filed.

This is a caſe of ſome diffiulty. The greateſt I have felt has been as to the rate of intereſt, with which I ſhould decree repayment. It appeared to me at firſt, that upon the principle of *Ekins* v. *The Eaſt India Company* (*a*) the plaintiff might be entitled to ſuch ſum of money, as I ſhould decree to be repaid to him, with *Indian* intereſt: but upon a full conſideration of all the circumſtances I think, I ſhould do injuſtice by giving *Indian* intereſt in the preſent ſtage of the cauſe. But I do not determine, that if the *Eaſt India* Company ſhould think fit to inſtitute a ſuit againſt Mr. *Tierney*, what would be my opinion. Certainly it would be proper, that power ſhould be reſerved to give a farther rate of intereſt. But the queſtion now is, whether the plaintiff is entitled to any part of this from the Company. As to the ſum of 50,548 rupees, they admit, that he has a clear right to that ſum upon thoſe conditions; and nothing is more clear than that as between them and the ſurety they could never demand that ſum. No principle of common juſtice would permit them to claim that ſum from the ſurety after having paid it back to the principal. There can be no doubt therefore under theſe circumſtances they had no right to compel the payment of that ſum.

As to the other ſum, there is much more doubt, whether that ought to be refunded. But upon full conſideration of all the circumſtances I think, I ſhould not do juſtice without decreeing the repayment of that ſum; for the Company ought not to have de-

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(*a*) 1 *P. Wms.* 395. 2 *Bro. P. C.* 72.

manded the payment, if they demanded any ſecurity. There is no doubt, that upon a joint and ſeveral bond each obligor is a principal at law: but this Court makes a wide difference, as juſtice requires, between principals and ſureties. What is the obligation of the ſurety? Merely, that Mr. *Tierney* ſhall duly account, and that he ſhall pay any balance, that may be due from him. The account ought to be ſettled, before the ſurety is called upon; unleſs there is fear, of inſolvency. That is the obligation the ſureties ſuppoſed themſelves to enter into. Inſtead of that for ſix or ſeven years this matter goes on: no demand is made: one of the ſureties withdraws his aſſets; and the principal himſelf is permitted to do ſo. I give no opinion, whether the ſureties were diſcharged; as will probably be contended hereafter, if the Company think fit to inſtitute any ſuit. *Niſbet* v. *Smith* (*a*), and *Rees* v. *Berrington* (*b*) are very ſtrong authorities in favor of ſureties. Where any act has been done by the obligee, that may injure the ſurety, the Court is very glad to lay hold of it in favor of the ſurety. In this caſe there is more reaſon to do ſo; for there is no doubt of the ſolvency of the principal. Then after all theſe circumſtances, that ſum paid to the repreſentatives of the principal, permitting the aſſets both of him and one of the ſureties to be withdrawn, the account going on unliquidated for ſix or ſeven years, this demand is made by the Company againſt a ſurety, not only to give ſecurity to pay the balance, that ſhall appear due upon the account, but to pay without proceeding to take the account; and they enforce it by the power they had over him, as one of their ſervants. Unleſs they had that power, they could not have compelled him to pay without taking the account. What is the fair juſtice? That they ſhall not be the better for exerciſing that act of power. I do not mean to determine, that the ſureties are diſcharged. I have not *data* enough before me, till they think fit to bring a ſuit; which will probably be brought againſt *Graham*.

Any act of the obligee, that may injure a ſurety, is laid hold of in his favor.

As to the claim of *Indian* intereſt, *Ekins* v. *The Eaſt India Company* is a very ſtrong caſe. I have examined the Regiſter's Book; and it is right, as reported. The decree of Lord *Cowper* was affirmed; therefore it is a very high authority. As the Company had acted unjuſtly, it was determined, that they ſhould pay as

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(*a*) 2 *Bro. C. C.* 579.

(*b*) *Ante*, vol. 2. 540.

much intereſt, as would have been procured, if the party had ſtaid in *India*, and lent his money out at intereſt there. That caſe was ſtrongly inſiſted on in the argument: but I muſt not forget, that if I give *Indian* intereſt, notwithſtanding I think this was a very harſh demand, the Company might be put to a great loſs and inconvenience with regard to the intereſt they might have got from *Tierney*. Though I diſapprove of the payment made by *Prager* and *Morris*, I do not mean to ſay, they acted unwiſely, having a limited ſum in their hands, and being afraid of conteſting it. But I diſapprove of the manner, in which they ſettled it. They had better have deſired the Company to go on and ſubſtantiate their claim. If they had done that, the Company would not, as they may now, have loſt all the intereſt of the ſum they ſo recovered. If *Law*'s ſureties had ſaid to *Graham*, that if he would not defend the ſuit, they would plead, and let the Company prove what they could, and pay accordingly, and then call upon him to repay what they had paid to the Company, then the Company might have made a queſtion as to their right againſt *Tierney* to repayment with intereſt. That queſtion is made in their anſwer: but I do not chooſe to give any opinion upon it. Mr. *Tierney* means to reſiſt that. Beſides it is not neceſſary finally to determine that queſtion now; being of opinion, that the defendants, the Company, muſt put this plaintiff in the ſame ſituation; and I take this opportunity of ſaying, that, if it were not for that high authority I ſhould have great doubt, where perſons deſert the proper tribunal, and come here to make a demand, whether I ſhould give them more than the intereſt of the country, to which they reſort. But under the circumſtances I think I ſhould go too far, if I gave more than the legal intereſt in this country.

Another doubt occurred to me; what decree I ſhould make as to the defendant *Tierney*. He ſeems to feel the ſituation of the plaintiff; who is only a ſurety for the perſon he repreſents, and whoſe aſſets he has; he being certainly the perſon to account. He very properly ſays, he cannot admit a demand to carry intereſt, which does not carry intereſt. The queſtion is, can there be any decree againſt him? I think not in this cauſe. The Company muſt be left to inſtitute any ſuit againſt him, as they may be adviſed. A doubt occurred to me, whether he ſhould not be compelled to appear in *India*. In this Country he certainly is amenable.

ble: I rather think, the Company has a right to that under the circumſtances, and conſidering the conduct of *Graham*; who has left the plaintiff in this extraordinary ſituation. I rather think, I ſhould order the defendant *Tierney* to appear to any ſuit, that might be inſtituted in that Country. That undoubtedly is the proper place for ſettling the account. It muſt be ſettled there. I wiſh to know, whether the appearance to ſuch a ſuit would put him under any great difficulty, that ought to exempt him. It occurs to me, that juſtice cannot be done without putting the Company in a ſituation of having the account taken there, or at leaſt ſending a Commiſſion from this Country: but it muſt be in a ſuit againſt Mr. *Tierney*.

Then upon what terms is this plaintiff entitled to be repaid? It muſt be upon giving ſecurity for repayment of the ſum of 46,309 rupees, in caſe after the determination of any proceeding, that may be had againſt Mr. *Tierney*, the ſurety may be held liable. Till that queſtion is determined, I certainly ſhall not permit any ſuch ſuit againſt the ſurety.

The Counſel for the defendant *Tierney* objected to any order upon him ſpecifically to appear to a ſuit to be brought by the Company in *India*; as there was a repreſentative of *William Tierney* reſiding in *India* in the ſervice of the Company.

The decree was, that upon the plaintiff's giving ſecurity for the repayment of 46,309 rupees with intereſt at the rate after directed the defendants, the *Eaſt-India* Company, ſhall pay to the plaintiff the ſum of 96,857 rupees 7 annas 2 pice, computing the rupee at 1*s.* 11*d.* (*a*), with intereſt at 5 *per cent.* from the time the ſame was paid in *India*; that the defendants, the *Eaſt-India* Company, ſhall be at liberty to proceed againſt the repreſentatives of *William Tierney*; who are to be reſtrained from giving in evidence or ſetting up in ſuch ſuit or action the payment of the ſaid ſum of 96,857 rupees 7 annas 2 pice on the part of the plaintiff to the Company; that the Company ſhall pay the plaintiff the coſts of the ſuit to the time of the decree, and the plaintiff ſhall pay the repreſentatives of *Henry Vanſittart* their coſts to the time

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(*a*) It was agreed to be taken at that value.

of the decree, to be repaid to him by the Company; that the conſideration of the coſts of the defendant *Tierney*, and the ſubſequent coſts of the ſuit, and all farther directions be reſerved, until the event of any ſuit or action to be brought by the Company be determined; and in caſe the Company neglect to inſtitute a ſuit within two years, or in caſe the repreſentatives of *William Tierney* ſhall refuſe to appear to ſuch ſuit, if any ſuch ſhall be commenced in the courts of *India*, that any of the parties ſhall be at liberty to apply to this Court.

Ex parte FREEMAN.

July 25.

Though a creditor having received a dividend under a bankruptcy may refund and proceed at law, he cannot, if he has ſigned the certificate.

THE petitioner had accepted a bill for the accommodation of the bankrupt. The bankruptcy happening on the 27th of *February* 1793, before the bill was due, the petitioner took it up; and proved under the commiſſion in reſpect of the bill and another debt, received a dividend, and ſigned the certificate.

The petitioner afterwards tendered to the ſurviving aſſignee the amount of the dividend upon the bill; who refuſed to receive it; upon which the petition was preſented; praying an order upon the aſſignee to receive the dividend; and that the proof might be expunged.

Mr. Cooke for the petitioner ſaid, the certificate was ſigned by miſtake.

Mr. Mansfield for the bankrupt ſaid, if the petitioner had a right to bring an action, what had been done would be no prejudice; and the object being to compel payment out of ſome ſeparate property acquired by the bankrupt's wife deſerved no aſſiſtance.

Mr. Cooke ſaid, the Court of law would only look to the proceedings.

LORD CHANCELLOR—If he had only received the dividend, and refunded (*a*), he might have brought an action. But he has

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(*a*) 1 *Cooke's* Bankrupt Law, 127.

ſigned the certificate; becauſe he thought there was no more to be got (*a*).

The petition was diſmiſſed with coſts.

(*a*) *Ex parte Callow, ante*, vol. 3. 1.

Ex parte ABELL.

July 26.

Upon the proof of a joint debt under a ſeparate commiſſion of bankruptcy no dividend can be taken, till the ſeparate creditors have received 20*s.* in the pound.

George Notley and ſeven other perſons, carrying on buſineſs in partnerſhip as coach-maſters became indebted to the petitioner in that buſineſs for horſes ſold in the ſum of 696*l.* 12*s.* As a ſecurity for that debt they gave a warrant of attorney to confeſs judgment, with a defeazance declaring, that it was given to ſecure the ſaid debt upon the 9th of *October* following. On the 9th of *October* they applied to him to accept a compoſition of 10*s.* in the pound: which he refuſed: but he agreed to take 17*s.* 6*d.* in the pound; 10*s.* payable immediately; and the remainder by two inſtalments: *viz.* 5*s.* upon the 9th of *October* 1799, and 2*s.* 6*d.* upon the 9th of *October* 1800, with intereſt. They paid 10*s.* in the pound accordingly; and it was agreed, that the judgment ſhould remain a ſecurity for the two inſtalments.

Upon the 19th of *February* 1799 a ſeparate commiſſion of bankruptcy iſſued againſt *Notley*. The commiſſioners refuſing to let the petitioner prove, except for the purpoſe of aſſenting to or diſſenting from the certificate, the petition was preſented; praying, that a dividend might be paid him upon the debt of 268*l.* 12*s.*

Mr. Graham and Mr. Cooke for the petition—This petition is in the nature of an appeal from the caſe *Ex parte Elton* (*a*); in which your Lordſhip took a general review of the caſes; and departed from the rule eſtabliſhed by Lord *Thurlow*, that a joint creditor may take a dividend upon the ſeparate eſtate. The old rule was not to admit proof of a joint debt againſt the ſeparate eſtate, except for the purpoſe of ſtaying the certificate. Upon the principle, that the joint creditors have a preferable claim upon the joint effects, and *vice verſâ* the ſeparate creditors upon the

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(*a*) *Ante*, vol. 3. 238. See all the caſes collected by Mr. *Cooke Bank. Law*, edit 4. vol. 1. 237.

ſeparate eſtate, it went to this extent; that the joint creditors ſhall not come in upon the ſeparate eſtate, till all the ſeparate creditors are paid. But other caſes have gone againſt that; and particularly *Ex parte Haydon* (a); where it was determined, that the joint creditors may come in effectively upon the ſeparate eſtate; there being no joint eſtate. That caſe is in circumſtances very like this; for this creditor cannot be paid at all, if not out of this ſeparate eſtate. *Ex parte Elton* is diſtinguiſhable from this. Your Lordſhip declared, that the equity proceeded upon the idea, that it is againſt juſtice and conſcience for the creditor to proceed againſt one fund, where he has a preferable claim upon another. The queſtion your Lordſhip put, why the creditor does not go againſt the joint eſtate, is anſwered in this caſe thus; that there is no joint eſtate. Your Lordſhip upon that occaſion thinking they acted againſt conſcience ſent them to look after the partnerſhip effects. In this caſe the preferable remedy is gone; for there are no partnerſhip effects; and the creditor ſtands here in preciſely the ſame ſituation, in which he would ſtand at law. He has got a judgment; upon which he could take out execution againſt any one of theſe partners, if it had not been for the bankruptcy; and their only remedy would have been a contribution among the ſeveral partners. The clear principle reſulting from the caſes is, that, as it is vain to reſort to the preferable fund, this creditor is equally a creditor in conſcience as any other. It is the debt of every one and of all. The rule adopted in *Ex parte Elton* cannot be conſidered as prevailing, except where a joint fund exiſts.

The Attorney-General for the aſſignees—The principle, upon which your Lordſhip decided *Ex parte Elton*, is the extreme inconvenience, if every joint creditor is permitted in caſe of a commiſſion againſt one partner to prove the debts of that concern againſt the ſeparate eſtate, and compel the aſſignees to inſtitute a ſuit for a contribution by the other partners; which is a neceſſary conſequence. The petitioner does not ſtate what was done with regard to the ſeven other partners. The conſequence of admitting this claim is, that every creditor of the concern muſt be admitted. In equity this partner is only liable to pay an eighth; and upon this rule he would in the firſt place be obliged to pay a dividend upon all the joint debts. If all the partners had become bankrupt, the creditor might prove againſt all; and your Lordſhip could in bankruptcy adjuſt it between all the eſtates. This creditor without ſhewing what has been done with the other ſeven partners now comes for a dividend out of the ſeparate eſtate of this bankrupt. Whether that proportion is the proper one upon his eſtate, cannot be decided in bankruptcy. Your Lordſhip thought, the moſt convenient courſe was to put it upon the creditors to do that, which muſt otherwiſe be done by the aſſignees, proceed againſt the other partners. This is very different from a bill of exchange. The holder of the bill has a right to reſort to each party, till he receives 20*s.* in the pound; and, when he has received that, he ceaſes to be a creditor. That is the ſort of engagement every party to ſuch a tranſaction comes under. But in the caſe of a partnerſhip the engagement is joint and not ſeparate. An action brought for the 7*s.* 6*d.* in the pound, the remainder of the compoſition, muſt be brought againſt all. This proof therefore ought to ſtand, not for the purpoſe of making a dividend, but the aſſignees ought to retain ſufficient to anſwer this creditor, when it is aſcertained, what ought to be paid him out of this eſtate.

(a) 24 *June* 1785. 1 *Cooke's Bank. Law*, 240. edit. 4.

Mr. Graham in reply—The caſe *Ex parte Elton* is certainly diſtinguiſhable; for there the creditor had not reſorted to the other partners. In equity every individual is bound to pay, and therefore the one, who is ſolvent, muſt pay the whole. There is a balance of inconveniences; and the queſtion is, which party is to ſubmit to it. The fact is, though, I admit, there is no affidavit of it, that all the other partners are perfectly inſolvent. The aſſignees would not file a bill for a contribution.

LORD CHANCELLOR—Why ſhould I drive them to do it? The fact in the particular caſe never can be a ground. If I had an intimate knowledge of that fact, which I cannot have, that would not warrant me. This is exactly the inconvenience, that ſtruck me ſo forcibly upon the former occaſion. If you receive a dividend upon the eſtate of the bankrupt, you compel his aſſignees to file a bill in equity againſt ſeven other perſons. This is a joint contract. They are not ſeverally bound. You cannot poſſibly ſue ſeverally; as you may, where they are jointly and ſeverally bound. If they are all bound, this bankrupt is only bound as to

In bankruptcy the joint eſtate is to be firſt applied to the joint debts; and after they are paid the ſurplus, if any, to the ſeparate debts; and *vice verſâ* as to the ſeparate eſtate.

his *aliquot* part. I really feel, that the practice, that prevailed for ſo long a period, upon the clear rule of equity, that the joint eſtate ought to be applied firſt to the joint debts, and, after they are paid, then to the ſeparate debts, and *vice verſâ* the ſeparate eſtate firſt to the ſeparate debts, is as far as the Court ought to have gone.

Upon the propoſal of the Attorney-General the order was, that the petitioner ſhould take a dividend, not exceeding an eighth; and in caſe there ſhould be any farther dividend, the conſideration of his claim was farther reſerved.

GIBBONS *v.* CAUNT.

Rolls.
June 16, 17.
July 27.

A queſtion upon the conſtruction of a will, whether the perſonal eſtate was wholly or partially diſpoſed of, was not decided; an agreement upon the ſubject, though the inſtrument, that was prepared, was not executed, being eſtabliſhed, as clear, fair, and reaſonable, not within the *Statute of Frauds*, concluded with full knowledge of the circumſtances, and not waived; and the bill in effect, though not in terms, praying a performance.

Whether by the birth of more children, ſubſequent to the date of the will, and, after the death of the teſtator's wife his ſecond marriage, but no children by that, the will is revoked, *Quære.*

THOMAS GIBBONS, a meſſenger of the Treaſury, made the following will, dated the 30th of *September* 1766; and atteſted by three witneſſes:

“ Firſt, I order and direct, that all my juſt debts and funeral
“ expences ſhall be fully paid and ſatisfied. *Imprimis*, I give to
“ my dear and loving wife *Sarah Gibbons* the intereſt ariſing from
“ 600 *l.* which money being lodged in the Conſolidated 3 *per cent.*
“ Annuities and the uſe of all my houſehold goods of what kind
“ or nature during her natural life; and after her deceaſe I diſpoſe
“ of that 600 *l.* equally between my two children (that is to ſay)
“ 300 *l.* to my ſon *George Gibbons* and 300 *l.* to my daughter
“ *Maria Gibbons*; and in caſe my dear and loving wife ſhould die
“ during the minority of her children, then they are to have the
“ intereſt ſeparately of the afore mentioned ſums, till they attain
“ the age of twenty-one years, afore their legacies are payable;
“ and if either of my children ſhould die during their minority,
“ then his or her legacy ſhall go to the ſurvivor. I likewiſe farther
“ apply 300 *l.* and my wardrobe to be diſpoſed of to the beſt
“ advantage, which I value at the worth of 100 *l.*; which ſums
“ of 300 *l.* and 100 *l.* to be applied to maintenance, education,
“ and placing out in the world, my two children to ſuch trades as
“ my dear and loving wife and executors ſhall think moſt fitting
“ for them; and it is my deſire, that my ſon *George Gibbons* and

“ my daughter *Maria Gibbons* ſhall be under the care and direc-
“ tion of my dear and loving wife *Sarah Gibbons* during their
“ minority; and I do farther authorize and empower my executors
“ with the conſent of my dear and loving wife *Sarah Gibbons* to
“ place out at intereſt my perſonal eſtate in the funds on (*a*) land
“ ſecurities if it ſhould ſo be obtained for the benefit of my chil-
“ dren and not otherwiſe; and I do hereby direct and order, that
“ my executors hereinafter named ſhall not be anſwerable for any
“ loſs, that ſhall or may happen to any part of my eſtate in the
“ execution of this my will but what ſhall actually come to their
“ reſpective hands or power; and laſtly I do hereby nominate,
“ conſtitute and appoint, my brother *John Gibbons* of the pariſh
“ of *Sutton St. Michael*, Gentleman, and my brother in law *Abra-*
“ *ham White*, victualler, in *Park Street Groſvenor Square* execu-
“ tors of this my laſt will; and I do hereby commit them and to
“ the ſurvivor of them the management of my two children with
“ the conſent of my dear and loving wife *Sarah Gibbons*, until they
“ attain the age of twenty-one years; confiding in and empower-
“ ing them my ſaid executors to appropriate yearly ſuch part
“ thereof as they ſhall think moſt fitting for maintenance and
“ education.”

At the date of the will the teſtator had only the two children mentioned in it. Afterwards he had by the ſame wife *Sarah*, two other ſons: *Thomas Gibbons* born in 1768; and *Charles John Gibbons*, born in 1770. *George Gibbons* died in the teſtator's life, a widower, without iſſue. *Sarah*, the wife of the teſtator, died in his life. He afterwards in 1784 married *Mary George*; who ſurvived him: but there was no iſſue of that marriage. *Thomas Gibbons* died in 1794 leaving a ſon, *Thomas Gibbons*, of the age of two years. The teſtator died upon the 11th of *December* 1796. His daughter *Maria Gibbons* married *Thomas Caunt*. *Abraham White* died in the life of the teſtator. The other executor renounced; and adminiſtration was granted on the 15th of *April* 1797 to *Caunt* in right of his wife.

The teſtator died ſeiſed of a conſiderable real eſtate: but he had no real eſtate at the date of his will.

(*a*) There was ſome doubt on the original will, whether this word was “*on*” or “*or*.” It was at length agreed, that it was “*on*.”

The

The bill was filed by *Charles John Gibbons* and on behalf of *Thomas Gibbons*, the infant heir at law of the teſtator, againſt *Caunt* and his wife and the teſtator's widow; ſtating, that, doubts having ariſen reſpecting the conſtruction of the will, it was agreed, that the legacies given by the will and all the ſums advanced by the teſtator to *Sarah Caunt* ſhould be brought into hochpot, and the reſidue of his perſonal eſtate ſhould be diſpoſed of according to the *Statute of Diſtribution* (*a*). The prayer of the bill was, that an account may be taken of all rents and profits of the teſtator's real eſtate received by the defendants; and that the teſtator may be declared to have died inteſtate as to the real eſtate; and that it deſcended to his heir at law; that contracts entered into by the teſtator for the purchaſe of real eſtates may be performed; the purchaſe-money to come out of the perſonal eſtate; that an account may be taken of the perſonal eſtate; and that the teſtator may be declared to have died inteſtate with regard to the reſidue of ſuch perſonal eſtate undiſpoſed of by his will; and that the clear reſidue may be aſcertained; and one-third may be declared to belong to *Mary Gibbons*, and the other two-thirds to *Maria Caunt* and the plaintiffs, as the only children and grand-child of the teſtator; and that the legacy to *Maria Caunt* may be declared adeemed by the portion given by the teſtator upon her marriage; and that ſuch portion may be brought into hochpot, and the ſame with the remaining two-thirds of the reſidue of the perſonal eſtate may be divided between the plaintiffs and *Maria Caunt* according to the ſtatute.

The defendants *Caunt* and his wife by their anſwer inſiſted, that the legacies given to *Maria Caunt* were not adeemed by the portion; and that the teſtator did not die inteſtate as to the reſidue of his perſonal eſtate, but that the defendant *Caunt* in right of his wife is entitled to a moiety of the three ſeveral legacies of 600*l.* 300*l.* and 100*l.* given to her by the will; and by reaſon, that *George Gibbons* died in the life of the teſtator, is alſo entitled to the whole of the reſidue, if any, of the teſtator's perſonal eſtate as ſurviving joint-tenant thereof.

Upon the argument of this cauſe upon the 17th of *June* it was referred to the Maſter to inquire, of what the perſonal eſtate of the teſtator conſiſted at the time of making his will and at his death;

(*a*) 22 & 23 *Char.* 2, c. 10. 29 *Char.* 2. c. 3.

and whether there was any and what agreement entered into relating to the diſtribution of his perſonal eſtate, and by and between whom, and to ſtate the conſideration and circumſtances; and whether it would be for the benefit of the infant plaintiff.

The Maſter's Report, dated the 3d of *July* 1799, ſtated, that the perſonal eſtate of the teſtator at the time of making his will conſiſted of 600*l.* 3 *per cent.* Conſolidated Bank Annuities, then ſtanding in his name; that no evidence had been laid before the Maſter to ſhew, that the teſtator at that time poſſeſſed any other perſonal eſtate; and no other perſonal eſtate can at this diſtance of time be aſcertained.

The Report then ſtated the particulars of the teſtator's perſonal eſtate at the time of his death, *viz.* ſtock in the public funds, leaſehold premiſes, money out upon mortgage, and other particulars, to the amount in the whole of 11,650*l.* 17*s.* 3*d.*; beſides debts ſuppoſed to be due to him to the amount of above 6000*l.*; of which there were no regular accounts.

With reſpect to the agreement the Report ſtated, that ſoon after the death of the teſtator doubts having ariſen as to the meaning and effect of his will and the adminiſtration thereof, and *Charles John Gibbons* being in *Ireland* at the death of his father, his wife by the advice of her ſolicitor cauſed a *Caveat* to be entered againſt granting adminiſtration without his concurrence; and *Thomas Caunt* and *Mary Gibbons* cauſed an agreement in writing to be prepared; and by articles of agreement, reciting the will, and the circumſtances, that had taken place in the family; and that the teſtator had died without having, ſo far as had been diſcovered, revoked the ſaid will; that the ſurviving executor had renounced; and that, inaſmuch as conſiderable doubts may be entertained, whether the reſidue of the perſonal eſtate of the teſtator was diſpoſed of by the above will, or whether the ſame is diviſible among the widow and his children and grandchildren according to the *Statute of Diſtribution;* for obviating and removing all ſuch doubts, and to prevent all diſputes between the ſaid parties, it had been agreed (ſubject to the rights of the parties under any ſubſequent will, if any ſuch ſhould be diſcovered) that the reſidue of the teſtator's perſonal eſtate, after payment of the ſaid legacies, or ſuch part thereof as therein after mentioned, and all debts and funeral and teſtamentary expences, ſhould be divided between the widow, children and grandchildren, according to the *Statute of Diſtribution*; it was therefore witneſſed, that ſubject to any ſubſequent will, if diſcovered, *Caunt* and his wife ſhould forthwith apply for adminiſtration with the will annexed; and that after payment in the firſt place of the debts, funeral and teſtamentary expences, and after taking to himſelf, *Thomas Caunt*, the ſaid teſtator's wardrobe, and after payment, deduction, and reſervation, of the ſaid legacy of 600*l.* 3 *per cent.* Conſolidated Bank Annuities, and 300*l.* to or by him in right of his wife, or ſuch ſhare or proportion of the ſaid legacies as he is legally entitled to, then the net reſidue or ſurplus of the teſtator's perſonal eſtate ſhould be divided according to the *Statute of Diſtribution* as the undiſpoſed reſiduary eſtate; and it was agreed, that until the expiration of fourteen months, but not afterwards, the agreement ſhould be without prejudice to any ſubſequent will, if any ſuch ſhould appear.

The Report farther ſtated, that this agreement was duly executed by *Thomas Caunt* and *Mary Gibbons* without the knowledge of *Charles John Gibbons*. After his arrival in *England* he refuſed to ſign it without the approbation of his ſolicitor. At a meeting on the 13th of *April* 1798 he inſiſted, that the portion given by the teſtator upon the marriage of his daughter ſhould be brought into hochpot; which was refuſed at that time: but at another meeting on the 15th of *April* that was agreed to; and it was farther agreed, that *Charles John Gibbons* ſhould withdraw his *Caveat*; and the ſolicitor of *Caunt* was to alter the agreement accordingly, and to get it engroſſed; which was done accordingly; and the three parts remained with him unexecuted. The *Caveat* was withdrawn on or immediately after the day of the laſt meeting; and *Mary Gibbons* having renounced her claim to adminiſtration upon the 19th of *February* 1797 adminiſtration was granted to *Caunt*. The agreement was never tendered to *Charles John Gibbons* for execution.

The Maſter farther found, that the bill was amended by order, dated the 8th of *December* 1798; and the agreement was introduced; and it was prayed, that the defendants might ſtand to and perform it. The bill was again amended on the 26th of *January* 1799; and all the former amendments were ſtruck out, except the ſtatement, that the agreement had been entered into to the effect before mentioned. The Maſter ſtated, that it was alleged before him, that the defendant *Caunt* in right of his wife claimed the reſidue of the teſtator's perſonal eſtate as ſurviving joint-tenant; alſo that the teſtator's widow forbore diſputing the will, and renounced, in contemplation of the agreement, and with the expectation, that it would be executed, and before the firſt agreement was ſigned by her. The Report alſo ſtated, that the agreement was for the benefit of the infant.

This cauſe was argued, firſt, by *Mr. Graham, Mr. Grant and Mr. Trower, for the plaintiffs: and Mr. Lloyd, Mr. Richards, Mr. Romilly, and Mr. Leach, for the defendants*; and upon the Maſter's Report, Mr. *Grant* in the interval being appointed *Solicitor General*, by *Mr. Piggott, Mr. Graham, and Mr. Trower for the plaintiffs and by the ſame Counſel, as before, for the defendants.*

For the plaintiffs—If the points are not concluded by the agreement, and this is to be conſidered as the laſt will, though there is great reaſon to think it ought not under the circumſtances to be ſo conſidered, there are three poſſible conſtructions: firſt, that there is no diſpoſition of the reſidue of the perſonal eſtate: ſecondly, that the teſtator has made a diſpoſition of it; but that diſpoſition was in favor of the two children then living: thirdly, that he has made a diſpoſition of the reſidue among all his children born at any time during his life.

The firſt conſtruction depends entirely upon the word "*or.*" The words, taken literally as they ſtand, are not inſenſible. They have a meaning; to ſhift the money from the funds to landed ſecurities. It is perfectly conſiſtent to let them change the ſecurity, if the wife, who has a life-intereſt, thinks it deſirable, into a landed ſecurity. The inſertion or ſubſtitution of the word "*or*" would make it a direction to place out at intereſt what was already ſo placed out. There can be no pretence to ſay, the teſtator meant to include the whole perſonal eſtate in that clauſe. It is confined to the perſonal eſtate in the funds; and then there is a clear inteſtacy as to the reſt. If he had any other perſonal eſtate, he would hardly have been ſo minute as to mention his wardrobe.

Upon the other queſtions, ſuppoſing the reſidue is diſpoſed of, the diſpoſition cannot be confined to the two children named in the will. It would be a monſtrous concluſion, againſt which the court would ſtrain every nerve, that this daughter is in excluſion of all the reſt, both wife and children, to take the whole.

For the defendants—This caſe certainly contains very peculiar circumſtances; perhaps ſufficiently ſtrong to create a revocation of the will. It has been determined by the Eccleſiaſtical Court, that marriage alone, or the birth of iſſue alone, will not revoke a will: *Shepherd* v. *Shepherd* (*a*); but either is only evidence of an alteration of circumſtances; and with parol declarations will do. Notwithſtanding the prejudice, that muſt ariſe from the conſtruction, that this reſidue is diſpoſed of to the two children named in the will, and the defendant being the ſurvivor is entitled to the whole, that conſtruction, if neceſſary, muſt prevail; and cannot be ſupplied by the diſcretion of the Court. Looking to the whole will, the teſtator intended to give all the perſonal eſtate he had in the world, not before diſpoſed of. Suppoſe, he had left only the two children mentioned in the will, and the queſtion was between them and the widow: can it be ſuppoſed, he intended theſe words to apply to the 600*l.* ſtock, merely to transfer that from the ſecurity he had himſelf ſelected, the beſt that can be, to another ſecurity, without any reaſon for it? Except for the omiſſion of the word "*or*" this is in the common courſe. The words "*or*" and "*and*" are frequently ſubſtituted for each other; when there is no other way of making ſenſe of the will (*b*); and the inſertion of the word "*or*" is not a ſtronger operation. There is no neceſſary inference, that he means that, which is in the Funds. Can his having children afterwards make a different conſtruction? It is impoſſible to ſay, he meant to die inteſtate as to any part of his property.

Suppoſing this a reſiduary clauſe, only the children named in the will are intended. Thoſe two are marked as the only children he had in his contemplation. They are to take the whole reſidue; and this particular legacy is ſeparated from the general fund, not for the children, but for the wife.

(*a*) 5 *Term Rep. B. R.* 51. *n.*

(*b*) See *Maberly* v. *Strode*, *ante*, vol. 3. 450. and the references in the note 452.

Maſter

1799.
GIBBONS
v.
CAUNT.

Maſter of the Rolls—The facts, upon which this bill is brought, are ſomewhat extraordinary. This teſtator, who from his ſituation, being a meſſenger to the Treaſury, muſt be ſuppoſed to have had very little perſonal eſtate, having a wife and two children at the time, makes this extraordinary will; as to which, if it was neceſſary to decide upon it, the Court might be put to ſome difficulty to put a conſtruction upon it. Upon that will it is contended on one ſide, that he meant to place out all his perſonal eſtate in the funds; for as to the real eſtate it is clear he died inteſtate. The other conſtruction is, that he meant to change his perſonal eſtate from the funds to landed ſecurities. He directs, that his executors ſhall not be anſwerable for any loſs, that may happen to any part of his eſtate. He gives no legacies to his executors. He gives them the management of his two children, until they are of age; empowering them to appropriate for maintenance and education yearly ſuch part thereof as they ſhall think moſt fitting. Such part of what? Of his perſonal eſtate. There is no other antecedent.

It was contended, that he had given every thing to the daughter, that happened to ſurvive; that he meant at the day of his death, that *Maria Caunt*, to whom, which is a material circumſtance, he had advanced a portion upon her marriage, ſhould take every thing he had in the world, to the excluſion of the other children. It is evident, a will under theſe extraordinary circumſtances muſt occaſion diſputes between the different branches of the family. The oppoſite claims to adminiſtration led to the agreement ſtated in the Maſter's Report: one term of which, inſiſted on by *Charles John Gibbons*, was, that Mrs. *Caunt* ſhould bring her portion into hochpot. That muſt be for the benefit of the children entirely. The widow cannot claim any part of that. It muſt never be forgotten, that this agreement has no relation to real eſtate, and is not that ſort of agreement, with which the *Statute of Frauds* (*a*) has any thing to do. A parol agreement concerning perſonal eſtate to any extent, if fully eſtabliſhed, is binding. I of all perſons am diſpoſed to look with a very jealous eye upon parol agreements; but I do not find any doubt in this caſe as to the agreement upon the ſecond meeting; when orders were given to prepare formal inſtruments; which were prepared. If there was a doubt upon it, I ſhould put it into a ſhape of trial. But I am

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(*a*) 29 *Char.* 2. *c.* 3.

A parol agreement may be diſcharged by parol.

A ſubſequent marriage and the birth of a child revoke a will. *Quære* as to the propriety of admitting evidence againſt the preſumption.

ſatisfied as to that. Then has that agreement ever been waived, abandoned, or repudiated, by any of the parties? It is ſaid, *Charles John Gibbons* has waived it. If he had, the other parties could not be bound certainly: the contract would be diſſolved as to the others. Certainly a parol agreement may be diſcharged by parol. But has he done any act, that can amount to a waiver? The firſt ſtep he took immediately after the agreement was to pave the way for the adminiſtration the huſband of *Maria Caunt* was deſirous of obtaining; and which was prevented by the *Caveat* of the plaintiff. That is almoſt deciſive, and a very ſtrong ſtep to compel the defendant to perform his agreement. I admit, the parties were not at this time very confident upon that point, ſo much inſiſted on and with great juſtice, that there was great reaſon to contend, that this was not the laſt will; and that no part of it ought to have been proved; and they might have inſiſted the teſtator died inteſtate. We all know now, that a will is revoked by a ſubſequent marriage and the birth of a child. I believe, they do go the length of permitting evidence to be received againſt that (*a*). I do not like that; and Lord *Kenyon* in the laſt caſe, *Lancaſhire* v. *Lancaſhire* (*b*), did not form his opinion upon it. The circumſtances themſelves ſhould be held to be an ademption, independent of any particular knowledge the teſtator might have. I think that the very circumſtance of a wife and child infers a preſumption, that the will ſhall not ſtand. This has been followed in Courts of Law, and in the famous caſe of *Chriſtopher* v. *Chriſtoper* (*c*) in which there was a difference of opinion upon the Bench, and a very learned judgment was given by Baron *Perrot* againſt the opinion of the other Barons. Only for that majority I ſhould have held with Baron *Perrot;* for the deciſion was very ſtrong upon the *Statute of Frauds.* But ſuch a caſe as this has never yet beeen decided; the birth of children by the firſt wife after the execution of the will, and after the death of the wife a ſubſequent marriage, and no children by that. I do not ſay, it will have the ſame effect. I am not the Judge to decide that. But there is not a ſingle argument applying to the feelings of mankind to draw a deciſion from the Court, that will not apply to the one caſe as much as the other. Conviction flaſhes on every man's mind, that there is juſt as much preſumption. Why are theſe ſubſequent

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(*a*) *Brady* v. *Cubitt, Doug.* 31.

(*b*) 5 *Term Rep. B. R.* 49.

(*c*) In the Court of Exchequer *July* 6, 1771. See *Dougl.* 35. 4 *Burr.* 2171. 2182.

children leſs dear to him, becauſe he happened to have other children born before? I think, the ſame argument would do under theſe circumſtances. Therefore it was not a very clear caſe in favor of the defendants in the Eccleſiaſtical Court. That point muſt have been left open to them; and I ſhould have taken care of that by the decree, if I was not of the opinion I hold as to the agreement.

As to the conſtruction of the will I will only ſay, I think, my opinion would have been, that the teſtator died inteſtate as to all the perſonal eſtate, except what he had in the funds. But I am relieved from theſe difficulties by the agreement. The queſtion is, whether that is not binding. It muſt be binding upon all the parties or upon none. Firſt, it muſt be proved. Then it muſt be reaſonable. No man can doubt, that this Court will never hold parties acting upon their rights, doubts ariſing as to thoſe rights, to be bound, unleſs they act with full knowledge of all the doubts and difficulties, that ariſe: but if parties will with full knowledge act upon them, though it turns out, that one gains a great advantage, if the agreement was fair and reaſonable at the time, it ſhall be binding. There was a caſe before the Lord Chancellor, who ſpoke to me upon it, in which it was held, that the Court will enforce ſuch an agreement, though it turns out, that the parties were miſtaken in point of law; even ſuppoſing, Counſel's opinion was wrong.

Rule as to inforcing agreements.

If this plaintiff had done any thing ſhewing his intention not to be bound by the agreement, he could not inſiſt upon it; and I muſt have diſmiſſed the bill; though that would have been a harſh thing. But I am of opinion, what he has done does not amount to a waiver. I have looked at the bill; and though the plaintiff may not ſpecifically pray a performance of the agreement in words, yet they have after the third amendment left the agreement ſtanding; and the prayer of the bill does not depart from it: for it is exactly the ſame in effect. It appears to be a ſubſiſting agreement, fair and reaſonable, and ſuch as good conſcience required them to enter into; for I could not have ſlept, if I had inſiſted upon the rigid conſtruction of the defendants.

The wardrobe was a ſpecific legacy, and muſt be gone. I give no opinion upon the conſtruction of the will.

After the judgment was pronounced, there was ſome diſpute as to the legacy to the defendant; whether ſhe was entitled to 600 *l.* or 900 *l.* The Court diſapproved much of the latter conſtruction; and it was obſerved, that, as *George Gibbons* attained the age of twenty-one before his death, there could be no ſurvivorſhip. At length the defendant agreed to take 600 *l.*

By the decree the agreement was eſtabliſhed; and it was directed, that the defendants ſhould bring into hochpot 1095 *l.*, at which ſum it was agreed the portion ſhould be taken, to be divided between the children and grand-children, excluding the widow; and that the reſidue of the teſtator's perſonal eſtate, after payment of the debts, *&c*, and the legacy to the defendant *Mary Caunt* with intereſt, ſhould be divided according to the terms of the agreement.

END OF THE SITTINGS AFTER TRINITY TERM.

Cases in theſe Reports determined upon Appeal to the Houſe of Lords in the Year 1799, 1800.

Cave v. *Holford*, vol. 2. 604, *n.* vol. 3. 650. Decree affirmed on the 5th of *February* 1799.

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B

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SEE *Conſtruction.* *Ne exeat Regno* 4.

Crown.
SEE *Bankrupt* 11.

Cuſtom.
SEE *Copyhold.*

Cypres.
SEE *Charity* 2.

D

Debtor.
SEE *Aſſets.* *Creditor.* *Fraud* 1. *Intereſt.*

Debts.
SEE *Aſſets.* *Will* 46, 47.

Decree.
SEE *Practice* 5.

Decree Pro Confeſſo.
SEE *Practice* 7, 8, 9.

Deed.
SEE *Purchaſe.* *Title Deeds.* *Voluntary Deed.* *Will* 23.

Delegates.
SEE *Will* 15. 19.

Demurrer.
SEE *Lacheſs* 2. *Pleading.*

Deſcent.
SEE *Infant en ventre* 2. *Satisfaction* 2.

Deviſe.
SEE *Will.*

Deviſee.
SEE *Title Deeds* 1, 2.

Deviſe Executory.
SEE *Executory Deviſe.*

Deviſes Fraudulent.
SEE *Fraudulent Deviſes.*

Diſcount.
SEE *Intereſt* 3.

Diſſenters.
SEE *Charity* 4.

Diſcovery.
SEE *Practice* 16.

Diſtribution.
1. Diſtribution *per Stirpes & per Capita.* *Royle v. Hamilton.* 437

Double Legacies.
SEE *Will* 9.

E

Ejectment.
Upon an ejectment by an heir in tail, the defendants cannot reſt upon the judgment in the recovery: but all the proceedings muſt appear upon the Record. 71
SEE *New Trial* 2.

Election.
1. Where a teſtator conceiving himſelf entitled to the property of another perſon makes a general

a general diſpoſition of all his eſtate, and gives ſome benefit to that perſon, he muſt elect. Therefore a huſband conceiving himſelf entitled under a void deed to a reſidue bequeathed to his wife, and dying without getting poſſeſſion, having made ſuch a general diſpoſition by a will, under which ſhe took an intereſt, it is a caſe of election; and her election to take the proviſion under the will, which, tho' leſs in point of value, was to her ſeparate uſe, was eſtabliſhed againſt the aſſignees under the bankruptcy of her ſecond huſband. *Rutter* v. *Maclean*. *Page* 531

2. Teſtator made a proviſion for his wife; and gave a ſum of money in truſt for the ſeparate uſe of a daughter, and after her death to divide the principal equally between her children and their iſſue at twenty-one; if none ſuch, to his ſon; whom he made reſiduary legatee. Then after ſimilar, but unequal, proviſions for his other children he declared, that the proviſion in the will for his ſaid wife and their ſaid children was in ſatisfaction of all right, claim, *&c.* which ſhe, or they, or any or either of them, could ſet up, *&c.*; or which ſhe and they would be entitled to under his marriage articles; and if his ſaid wife and children or either of them ſhould refuſe, &c. he revoked the legacy and bequeſt therein contained to the uſe and benefit of ſuch one or more of them, his ſaid wife and children, who ſhould refuſe or decline to execute ſuch releaſe or diſcharge, and declared the ſame void as to ſuch one or more of them, who ſhould ſo refuſe, as tho' he had died inteſtate. A child electing to take under the articles forfeits the life intereſt; which falls into the reſidue: but the children of ſuch child are not bound by the election; and liberty was given to apply on the death of the parent. *Ward* v. *Baugh*. 623

SEE *Bankrupt* 12.

Emigrant.

SEE *Ne exeat Regno* 1.

Equitable Aſſets.

SEE *Aſſets* 1.

Equity of Feme Covert.

SEE *Baron and Feme*.

Equity of Redemption.

SEE *Aſſets* 1.

Error.

SEE *Account* 1.

Eſtate Tail.

SEE *Ejectment* 1. *Title Deeds* 2.

Evidence.

Upon a legacy to the wife of the teſtator, by the deſcription of his chaſte wife, evidence of her incontinence is not admiſſible. *Page* 809

SEE *Mortgage* 1. *Truſt* 2. 17. *Will* 49. 52, 53. 62.

Exception.

SEE *Practice* 6.

Executor.

1. An executor in *India* paſſing his accounts in this Court is entitled to the Commiſſion upon the receipts or payments, according to the practice in *India*. *Chetham* v. *Lord Audley*. *Poole* v. *Larkins*. 72
2. An executor, who died before probate, was held entitled to a legacy given for his care and loſs of time in the execution of the truſts of the will by having concurred with the other executors in directions for the funeral, and in paying ſome ſmall ſums on that occaſion. *Harriſon* v. *Rowley*. 212
3. *Qu.* Whether an executor was entitled to a legacy in that character, who died at a diſtance without manifeſting any intention to accept the truſt or without knowing it. 215
4. Giving directions for the funeral will not make a man executor. 216
5. If an executor without application to the Court does what the Court would have approved, it ſhall ſtand 369
6. Dividend received by an executor on account of a bond ſpecifically bequeathed, but retained by him, and another, to which he was beneficially entitled under the will, apportioned. *Innes* v. *Johnſon*. 568

7. One executor in truſt is not anſwerable for the receipts of the other merely by taking probate, permitting the other to poſſeſs the aſſets, and joining in acts neceſſary to enable him to adminiſter: otherwiſe if he goes farther and concurs in the application. *Hovey* v. *Blakeman.* *Page* 596

8. Agents being alſo appointed executors of the principal are not entitled to Commiſſion upon remittances from *India* by the teſtator not received until after his death. *Hovey* v. *Blakeman.* 596

9. Executors of a receiver admitting aſſets bound to anſwer what was upon a ſubſequent inquiry found due for intereſt. 606

10. Joining in a receipt, though perhaps not abſolutely neceſſary, not concluſive againſt an executor, any more than againſt a truſtee, to charge him with the receipts of his co-executor. 608

11. Bill of exchange remitted to two agents, payable to them perſonally, who on the death of the principal become his executors: the mere indorſement of one, after they are executors, in order to enable the other to receive the money, is not ſufficient to charge him, who does not receive it. 608

12. An executor keeping the fund, and uſing it for his own benefit, contrary to his truſt, decreed to account with intereſt at 5 *per cent.* and coſts. *Piety* v. *Stace.* 620

13. Executor acting with regard to the teſtator's property in any other manner than the truſt requires is anſwerable to the *Ceſtuy que truſt* for any gain, and is liable to any loſs. 622

SEE *Fraud* 1. *Infant* 1. *Partner* 3. *Practice* 10, 11. *Truſt* 1, 2. 4, 5. 9. 14, 15, 16, 17, 18.

Executory Deviſe.

SEE *Perpetuity.* *Will* 20. 24, 25. 29, 30, 31. 34, 35, 36.

Extent.

SEE *Bankrupt* 11.

Exemption. (of perſonal eſtate from debts.)

SEE *Aſſets* 6.

F

Father.

SEE *Parent and Child.*

Feme Covert.

SEE *Baron and Feme.*

Foreigner.

SEE *Bail* 1. *Ne exeat regno* 1. *Truſt* 13.

Fraud.

1. Though generally a bill by thoſe intereſted in the perſonal eſtate, as creditors, or next of kin, will not lie againſt a debtor to the eſtate, it will under circumſtances, as, in this caſe upon colluſion with the repreſentative. The defendant was alſo liable in the character of truſtee and agent. *Doran* v. *Simpſon.* *Page* 651

2. Sale (by the owner) of the command of a ſhip in the ſervice of the *Eaſt India* Company without their knowledge is illegal, and cannot be the ſubject of an action. 815

SEE *Legacy* 10. 12. *Principal and Agent* 2.

Frauds (Statute of).

1. Bill for ſpecific performance of a parol agreement to grant a leaſe for twenty years: plea of the ſtatute of Frauds, and anſwer denying, that facts alleged as a part performance were done in part performance: the plea was ſaved to the hearing, with liberty to except; the Lord Chancellor inclining to the opinion, that though the agreement is admitted, the ſtatute may be uſed as a defence to the ſuit. *Moore* v. *Edwards.* 23

2. Bill for ſpecific performance of a parol agreement for a leaſe within the ſtatute of Frauds, charging poſſeſſion taken under the agreement and other acts of part performance: plea of the ſtatute, and anſwer, not denying the acts alleged as a part performance; but ſtating, that being adviſed, he entered as tenant at will, he gave notice to quit: plea overruled. *Bowers* v. *Cator,* 91

3. Though payment of a ſubſtantial part of the purchaſe-money will take an agreement as to land out of the *Statute of Frauds* on the ground of part performance, payment of a ſmall

ſmall part, as five guineas, the purchaſe-money being 100, will not do. The plea of the ſtatute was allowed, with an intimation from the Court, that under the circumſtances of the caſe the bill would be diſmiſſed with coſts. *Main* v. *Melbourn.* *Page* 720

Fraudulent Deviſes (Stat. of).

Conſtruction upon the ſtatute of fraudulent deviſes. 550

French Emigrant.

SEE *Ne exeat regno* 1.

G

Grandchildren.

SEE *Will* 40. 54.

Guardian.

SEE *Truſt* 14.

H

Heir.

SEE *Charity* 1. *Juriſdiction* 1. *Legacy* 11. *Limitation*. *Purchaſe*. *Title Deeds* 1, 2. *Truſt* 4. *Will* 28. 51. 61.

Huſband.

SEE *Baron and Feme*.

I

Infant.

1. Where an infant is ſole executor, adminiſtration ſhall be granted to the guardian, or ſuch perſon as the Spiritual Court ſhall think fit, till the infant is twenty-one; at which time and not before probate ſhall be granted to him. 149
2. Payments to infants during minority to be diſcountenanced. 369
3. Copyhold lands mortgaged in fee by leaſe and releaſe as freehold: the cuſtomary heir is bound by a covenant for farther aſſurance: but during his infancy the Court refuſed to forecloſe; and would go no farther than directing the account, and that in default of payment the plaintiffs ſhould be let into poſſeſſion, and hold and enjoy, till the heir ſhould attain twenty-one, at which time he ſhould ſurrender; and a day was given to ſhew caſe againſt the decree. *Spencer* v. *Boyet.* *Page* 370

SEE *Intereſt* 1. *Partner* 1. *Portion* 1. *Practice* 10. *Satiſfaction* 1. *Will* 11.

Infant (en Ventre).

1. A child *en ventre ſa mère* may be vouched, may be an executor, may take under the ſtatute of diſtributions, by deviſe, under a charge for portions, may have an injunction and a guardian. 322
2. A child *en ventre ſa mère* is a life in being to all intents and purpoſes except in the caſe of a deſcent at common law. 334
3. The object of the ſtatute 10 & 11 *W.* 3. *c.* 16. was not to affirm the caſe of *Reeve* v. *Long:* but it eſtabliſhed, that the ſame principle ſhould govern, where the limitation was by deed of ſettlement. 342

SEE *Will* 25. 30.

Illuſory Appointment.

SEE *Power* 6, 7, 8.

Implication.

SEE *Will* 5, 6.

India.

SEE *Executor* 1, 8. *Fraud* 2. *Principal and Surety*.

Injunction.

SEE *Practice* 2. 11.

Intereſt.

1. The general rule, that a legacy payable in future ſhall not carry intereſt before the time of payment, applies to a legacy to infants payable at twenty-one: the exceptions are the caſe of parent and child, the caſe of a reſidue, and where from other ſpecial circumſtances an intention to give intereſt clearly appears. *Tyrrell* v. *Tyrrell.* 1
2. Intereſt given at 4½ *per cent.* *Cox* v. *Chamberlain.* 631
3. Under an agreement to take off a diſcount above 5 *per cent.* for prompt payment, though according to the cuſtom of the trade, the creditor cannot upon failure charge more than 5 *per cent.* *Ex parte Aynſworth.* 678

4. A proviſion by will for payment of intereſt of debts held not to extend to a debt by ſimple contract. *Tait* v. *Lord Northwick.* Page 816

SEE *Bankrupt* 3. 9. *Executor* 9. 12. *Principal and Surety* 2. *Truſt* 7.

Intereſt Executory.

SEE *Perpetuity.*

Intereſt veſted.

SEE *Veſted Intereſt.*

Ireland.

SEE *Practice* 15. *Limitation. Purchaſe.*

J

Joint Commiſſion.

SEE *Bankrupt.*

Joint-tenancy.

SEE *Will* 43.

Joint-Creditor.

SEE *Bankrupt. Creditor.*

Judgment Creditor.

SEE *Aſſets* 1, 2.

Juriſdiction.

1. A queſtion ariſing in equity, that prevents the aſſertion of a legal right, does not alter the tribunal. Therefore the Court will not determine a queſtion of partnerſhip in the event of a bankruptcy any more than of a death, or than it would determine a claim as heir, without a trial at law, unleſs perfectly ſatisfied; tho' the evidence is all in ſupport of the claim. The Court expreſſed great doubt, whether, the ſtock in trade being in the poſſeſſion of the bankrupt ſolely, the claim of partnerſhip could be ſuſtained upon the ſtatute 21 *James* I. *c.* 19. *ſ.* 10, 11. *Binford* v. *Dommett.* 756

SEE *Aſſets* 5.

L

Lacheſs.

1. Reſiduary legatee having been admitted to a copyhold eſtate was in poſſeſſion above 19 years; when the heir obtained poſſeſſion by ejectment, after acquieſcence for nine years the reſiduary legatee filed a bill, claiming the eſtate, as having been a redeemable intereſt in the teſtator; and, having been treated as ſuch, it was ſo decreed. An account was directed of the money expended in repairs, &c; and inquiries as to incumbrances; the Court inclining ſtrongly to ſupport the acts of the heir, while in poſſeſſion. *Hardy* v. *Reeves.* Page 466
2. Demurrer on the ground of length of time to a bill for redemption of a mortgage is good. 479
3. Bill for an account of the produce of the captures by the *Royal Family* Privateers of *Briſtol* diſmiſſed on the ground of lacheſs: the original bill having been filed in 1749: but the length of time cannot be pleaded in bar. *Pearſon* v. *Belchier.* 627
4. Specific performance refuſed on the lacheſs and trifling conduct of the plaintiff; the contract being for a ſale to the plaintiff under a bankruptcy of a reverſionary intereſt for life; which in the interval fell into poſſeſſion. The defendants having alſo been in ſome degree remiſs, the bill was diſmiſſed without coſts upon delivering up the agreement. *Spurrier* v. *Hancock.* 667

SEE *Bankrupt* 6. *Contract* 3. 4. *Satisfaction* 1.

Lapſe.

SEE *Veſted Intereſt* 3. *Will* 39. 56.

Leaſe for Lives.

SEE *Renewal.*

Legacy.

1. Legacies to be paid out of a ſpecific ſecurity, which failed, held general upon the circumſtances. *Roberts* v. *Pocock.* 150
2. Teſtatrix gave nine legacies of 1000*l.* each, part of 14,500*l.* *South Sea* annuities; and as to the reſidue of the ſaid fund and all other her perſonal eſtate, including ſuch of the ſaid legacies as ſhould lapſe by death, before they ſhould be transferable, upon

truſt to convert into money ſuch part of her reſiduary perſonal eſtate as ſhall not conſiſt of *South Sea* annuities, and inveſt ſuch money with any money belonging to her at her deceaſe in ſaid fund of *South Sea* annuities and from time to time inveſt the dividends, &c, of all ſuch *South Sea* annuities as ſhall conſtitute her reſiduary perſonal eſtate in the ſame fund, till the youngeſt of ſaid legatees ſhall, or would, if living, have attained twenty-one, and then to transfer the whole of ſuch *South Sea* annuities to ſaid nine legatees equally, with ſuch ſurvivorſhip as their original ſhares. The nine legacies of 1000 *l.* each only are ſpecific; the remainder of the *South Sea* annuities is part of the general perſonal eſtate. *Richardſon* v. *Brown.* *Page* 177

3. Legacy of the money due upon a note held ſpecific, upon the intention: but the inclination of the Court is againſt ſpecific legacies, and to hold it a general legacy, with reference only to the ſecurity, as the fund firſt to be applied to it. *Chaworth* v. *Beech.* 555

4. Specific legacy retained by the executor for aſſets; but was not wanted: in caſe of depreciation the legatee is entitled to the original value. *Chaworth* v. *Beech.* 555

5. Teſtator gave to his ſiſter the intereſt of 300 *l.* upon bond for life, and after her deceaſe to her daughter the intereſt due upon the ſaid bond at her death, with the principal. The legacy is ſpecific; and there being among other bonds one of the exact amount, it was held to refer to that, though an inſolvent ſecurity, and the intereſt in arrear before the death of the teſtator. *Innes* v. *Johnſon.* 568

6. The inclination of the Court is againſt ſpecific legacies. The conſtruction muſt be upon the face of the will, before the account of the effects is conſidered, to ſee, whether that affords a foundation. *Innes* v. *Johnſon.* 568

7. Legacy of "1000 *l.* out of my reduced "Bank Annuities" held pecuniary: the Court leaning againſt holding a legacy ſpecific, unleſs clearly intended. The Court would not take into conſideration the evidence of the value of the ſtock at the date of the codicil, by which the legacy was given, nor an eraſure of a legacy to the ſame perſon by the will; but decided upon the words of the codicil. *Kirby* v. *Potter.* *Page* 748

8. "Of my ſtock," or "in my ſtock" or "part of my ſtock" will make a legacy ſpecific. 750

9. A ſpecific legacy veſts immediately from the death of the teſtator. 751

10. If a legacy is given to a perſon under a particular character, which he has falſely aſſumed, and which alone can be ſuppoſed the motive of the bounty, the rule of the Civil Law, is adopted and the legacy fails. Therefore where a legacy was given by a woman to a man in the character of her huſband, whom ſhe ſuppoſed and deſcribed as ſuch, but who at the time of the marriage ceremony with her had a wife living, the Court in reſpect of his conduct held him not entitled; but inclined to think it would be otherwiſe, where from circumſtances not moving from the legatee himſelf the deſcription is inapplicable; as where a teſtator gives a legacy to a child from motives of affection, ſuppoſing it his own, but is impoſed upon in that reſpect. *Kennell* v. *Abbott.* 802.

11. A legacy out of the produce of a copyhold eſtate, directed to be ſold, failing was held to paſs by the reſiduary clauſe againſt the heir; the object being a general converſion out and out. *Kennell* v. *Abbott.* 802

12. By the Civil Law a falſe reaſon given for a legacy is not of itſelf ſufficient to deſtroy it, unleſs fraud; from which it may be preſumed, that, if known, the legacy would not have been given. 808

SEE *Charity.* *Double Legacies.* *Intereſt* 1. *Evidence* 1. *Practice* 10. 17. *Satisfaction* 1. 3. *Truſt* 12. *Will.*

Length of Time.

SEE *Lacheſs.*

Limitation Remote.

SEE *Perpetuity.*

Limitation (words of).

1. In a will the words "*heir male*" may be *nomen collectivum* to effectuate the general intention to include all the iſſue. 794

Lord and Tenant.

SEE *Copyhold.*

Lunatic.

1. Stock ordered to be tranſferred under the *Statute* 36 *Geo.* III. *c.* 90. the truſtee being of unſound mind, tho' no Commiſſion had iſſued; and having actually refuſed to tranſfer; the refuſal proceeding from mere weakneſs of mind. *Simms* v. *Naylor.* *Page* 360
2. Upon petition, praying a reference to the maſter as to the ſtate of the plaintiff and her fortune and directions for her maintenance, the property being too ſmall to bear a Commiſſion of lunacy, an order was made upon affidavits, without a reference, for payment of the dividends for the two enſuing quarters. *Eyre* v. *Wake.* 795

SEE *Repreſentative* 1.

M

Maintenance.

SEE *Portion* 1.

Marriage.

SEE *Baron and Feme.* *Contract* 2. *Will* 12.

Marſhalling.

SEE *Aſſets* 2. 4.

Miſtake.

SEE *Charity* 5. *Will* 3, 4, 5. 6, 49. 52, 53.

Mortgage.

1. A reference under the ſtatute 7 *Geo.* II. *c.* 20. muſt proceed upon admiſſion of the principal and intereſt due upon the mortgage; and the maſter cannot admit evidence. *Huſon* v. *Hewſon.* 105
2. Aſſignment of a mortgage without the privity of the mortgagor: the aſſignee takes ſubject to the account between the mortgagor and mortgagee. *Matthews* v. *Wallwyn.* 118
3. As between mortgagee and perſons claiming under him, without the privity of the mortgagor they cannot add to what is due, ſettle the account, or turn intereſt into principal. 128
4. After an aſſignment of a mortgage, payments to the mortgagee without notice muſt be allowed by the aſſignee. The Regiſtry, the premiſes being in *Middleſex*, is not notice for this purpoſe. Tender, after the bill filed, of the balance, deducting the payments to the mortgagee, with coſts, deprived the aſſignee of ſubſequent coſts. *Williams* v. *Sorrell.* *Page* 389

SEE *Aſſets* 1. *Bankrupt* 3. *Charity* 3, 4, 5. *Copyhold* 2, 3. *Infant* 3. *Lacheſs* 1, 2. *Renewal* 3. *Will* 11. 42.

Mortmain.

SEE *Charity.* *Will* 42.

Mutual Wills.

SEE *Will* 12.

N

Navigation Share.

SEE *Will* 42.

Ne exeat Regno (Writ of).

1. Writ of *Ne exeat Regno*, obtained by one French emigrant againſt another, diſcharged upon the circumſtances appearing upon the affidavits in ſupport of the Will, and upon the anſwer; which may be read, the application not being in the nature of an affidavit to hold to bail, but to the diſcretion of the Court, applying a remedy, not in it's origin diſtinctly applicable to private tranſactions between ſubject and ſubject. It is very delicate to apply it as againſt Foreigners, and it would be a neceſſary term, that it ſhall be ſimply a caſe of equity. *De Carriere* v. *De Callonne.* 577

New Trial.

1. Three trials frequent; and a fourth has been granted. 206
2. After three ejectments tried in *Ireland* an iſſue was directed out of *Chancery* between the ſame parties upon the ſame point. A new trial was afterwards granted upon appeal to the Houſe of Lords; and after that another ejectment was tried. *Lord Sherborne* v. *Naper.* 206
3. There is no queſtion of civil right, that in ordinary courſe of the juriſdiction of this country may not go through three inquiries. 207
4. In criminal caſes a repeated inquiry is not matter of right, but of diſcretion: and can only be had with the conſent of the Attorney General. 207

Next of Kin.

SEE *Fraud* 1. *Truſt* 1, 2. 5. 9. 14, 15, 16, 17, 18. *Voluntary Deed.* *Will* 54. 59.

Notice.

SEE *Mortgage* 4. *Truſt* 3.

O

Office.

Bond to ſecure an annuity to the obligor's mother for life: the condition reciting, that by the recommendation of friends he had been appointed to ſucceed his father in the command of a government packet, but on the expreſs condition of his making an allowance for the ſupport of his mother, *&c.*: the Maſter of the Rolls inclined to diſmiſs the bill filed againſt his executrix; but gave the plaintiff leave to bring an action. *Hartwell* v. *Hartwell.* *Page* 811

Outlawry.

SEE *Practice* 15.

P

Parent and Child.

SEE *Elections* 2. *Intereſt* 1. *Satisfaction* 3. *Truſt* 12.

Parol Agreement.

SEE *Contract.* *Fraud (Stat. of).*

Parol Evidence.

SEE *Mortgage* 1. *Truſt* 2. 17. *Will.* 49. 52, 53. 62.

Partner.

1. Though one of three partners is an infant, an action muſt be brought againſt all three. 164
2. A ſeparate creditor of a partner has no right againſt the joint property farther than the ſeparate intereſt of that partner; *viz.* his ſhare upon a diviſion of the ſurplus, ſubject to the accounts of the partnerſhip: therefore joint property of an inſolvent partnerſhip taken in execution for a ſeparate debt cannot be held againſt the joint creditors. *Taylor* v. *Fields.* *Page* 396
3. Aſſignee, executor, or ſeparate creditor, coming in the right of one partner againſt the joint property comes into nothing more than an intereſt, ſubject to an account between the partnerſhip and the partner, and therefore to the joint debts: aſſignee under a ſeparate commiſſion of bankruptcy has only the ſame right to ſtand in the place of the bankrupt by the common law, not under the bankrupt laws. 397

SEE *Bankrupt* 2. *Juriſdiction* 1. *Tenant in Common* 1. *Truſt* 3. 14.

Pauper.

A pauper is liable to be committed for filing an improper bill. 630

Performance.

SEE *Contract.* *Satisfaction.*

Perpetuity.

1. No limited number of lives for the purpoſe of poſtponing the veſting of an executory deviſe. 313
2. Limitation of a term or the truſt of a term for twenty lives in being ſucceſſively is good. 332
3. By the law of *Scotland* land may be made unalienable for ever under certain regulations. 339

SEE *Will* 20. 24, 25. 29, 30, 31. 34, 35, 36.

Pleading.

1. Adminiſtrator diſputing by his anſwer the foundation of the bill, *viz.* a balance of accounts againſt the teſtator's eſtate, need not ſet forth an account of the perſonal eſtate, *&c.* by way of ſchedule. *Phelips* v. *Caney.* 107
2. A ſchedule to an anſwer containing at length a bill of coſts and obſervations with reference to a bill formerly delivered for the ſame buſineſs held impertinent; though the bill called upon the defendant to ſet forth, how he computes and makes out his demand with all the particulars relating thereto,

thereto, with interrogatories pointed to the particular *items* and to a minute compariſon of the two bills. *Alſager* v. *Johnſon*. *Page* 217

3. Plea of a ſuit depending in the Court of *Chancery* in *Ireland* for the ſame matter over-ruled.

4. Bill ſtating a ſequeſtration for want of an anſwer prayed a diſcovery and account of all money or other property of the defendant in the original cauſe in the hands of the defendants, who were bankers, at the time of ſervice of the ſequeſtration, or ſince. Upon demurrer as to the money and anſwer as to the reſt of the bill the Lord Chancellor determined againſt the demurrer upon the form, conſidering it overruled by the anſwer, and would not in that ſtage of the cauſe decide the two points: 1ſt, whether a ſequeſtration upon meſne proceſs can be executed farther than to pay the expences: 2dly, Whether a *Choſe in action* is liable to ſequeſtration. *Simmonds* v. *Lord Kinnaird*. *Page* 735

SEE *Conſtruction*. *Fraud* 1, 2. *Lacheſs* 2, 3.

Portion.

The Court leans againſt the conſtruction for raiſing portions or maintenance out of a reverſionary term; and upon that principle, when the term fell into poſſeſſion, and the portion was raiſed, refuſed to charge the difference between the ſum annually allowed by the infant's grandfather for her maintainance and the ſum charged. *Lady Clinton* v. *Lord Robert Seymour*. 440

SEE *Satisfaction* 4.

Poſthumous Child.

SEE *Infant en ventre*. *Will* 25.

Power.

1. A power of appointment not executed by a general diſpoſition by will. *Croft* v. *Slee*. 60

2. Appointment by father and ſon under a power, of money charged on an eſtate; that in caſe the ſon ſhould ſurvive it ſhould be applied by him in and towards payment of the debts of the father; and ſubject thereto the reſidue, if any, ſhould go and be conſidered as part of the perſonal eſtate of the father; and in caſe the father ſhould ſurvive, it ſhould go and be paid by him, his executors, &c, in and towards ſatisfaction of his debts, with a ſimilar proviſion as to the reſidue. The father ſurviving appointed in favor of another ſon, for valuable conſideration as to part. As to that the decree directed payment under the appointment; the reſidue to be paid into Court, with liberty to apply; in caſe of no application within twelve months to be paid according to the appointment. *Lady Clinton* v. *Lord Robert Seymour*. *Page* 440

3. A having both a power and an intereſt, the eſtate being conveyed to ſuch uſes as he ſhould appoint, and, in default of appointment, to him in fee, conveys by leaſe and releaſe, uſing alſo words of appointment: the deed operates as a conveyance of his intereſt, not as an execution of his power; eſpecially if the effect of the latter conſtruction will defeat the object. *Cox* v. *Chamberlain*. 631

4. Power to revoke uſes, ſubſtituting other eſtates:
Quære, Whether a ſubſtitution of equitable for legal eſtates, though a bad execution at law, is ſufficient in Equity; as where it is done by appointing under a power, and declaring uſes upon the appointment; which are conſequently mere truſts. *Cox* v. *Chamberlain*. 631

5. An appointment exceeding the power by a limitation to objects not within the power is void as to the exceſs; as, where the power is to appoint to children, and the appointment is to a child for life, and after his deceaſe to his wife, and children: but that void limitation ſhall not defeat a limitation over to an object of the power, in caſe ſuch child dies without leaving a wife or child ſurviving. *Crompe* v. *Barrow*. 681

6. Truſt in marriage articles to pay certain funds, the property of the wife, to all and every her child and children in ſuch parts, ſhares, and proportions, as ſhe ſhould by will give, &c, and for want of ſuch gift, &c. to all and every her child and children part and ſhare alike, and for want of ſuch iſſue, over. By her will ſhe gave ten guineas,

part of the fund, to her eldeſt ſon, declaring, that he was otherwiſe provided for by the will of his uncle; and the remainder ſhe gave to all her other children, naming them, equally, with ſurvivorſhip in caſe of the death of any during minority, and before receipt of his, her, or their, ſhares; and in caſe of the death of her eldeſt ſon before he comes to the poſſeſſion of his uncle's fortune ſhe gave her ſecond ſon only ten guineas. The only proviſion of the eldeſt ſon was a remainder in tail after the life eſtate of his father; who ſurvived his wife. The Court was of opinion, 1ſt, that children illegitimate, being born after elopement, and no acceſs, clearly could not take: 2dly, that the ſhare appointed to a child, who died in the life of her mother, lapſed: but the caſe was determined upon the third point; that under the circumſtances the appointment of ten guineas was illuſory; and therefore the whole was void; and the fund was diſtributed among the ſurviving children and the repreſentative of the deceaſed child; the intereſt veſting on the birth, liable to be deveſted only by appointment. *Vanderzee* v. *Aclom.* *Page* 771

7. Under a power to appoint to and among ſeveral perſons each of the objects muſt have a part: but a Court of Law will not enter into the amount of the ſhare appointed. 785

8. In equity an appointment of a very ſmall ſhare is not illuſory, if juſtified by circumſtances; as where that object is otherwiſe provided for. 785

SEE *Purchaſe* 2. *Voluntary Deed* 1.

Practice.

1. *Subpœna* not neceſſary to an amended bill. *Skeffington* v. ——— 66

2. Upon an injunction bill to ſtay proceedings at law, the defendant living abroad, a motion, that ſervice of *ſubpœna* upon the attorney may be good ſervice, requires an affidavit of merits. *Stephen* v. *Cini.* 359

3. By the bankruptcy of the plaintiff pending an account the ſuit is abated. *Williams* v. *Kinder.* 387

4. *Qu.* Whether notwithſtanding the bankruptcy of the plaintiff at law the action may not proceed, the aſſignees giving ſecurity for the coſts. *Williams* v. *Kinder.* 387

5. A decree cannot be impeached collaterally in another cauſe. *Lady Clinton* v. *Lord Robert Seymour.* *Page* 440

6. After an order for confirming the Report *niſi*, filing exceptions and making the depoſit with the Regiſter, are no cauſe to prevent that order being made abſolute, unleſs an order for ſetting down the exceptions to be argued is obtained; which may be done either by the plaintiff or defendant. The order confirming the Report was diſcharged on payment of coſts. *Gildart* v. *Moſs.* 617

7. Where the bill is amended after anſwer, if the amended bill is not anſwered, the plaintiff is entitled to a decree, that the bill be taken *pro confeſſo* generally. *Jopling* v. *Stuart.* 619

8. An inſufficient anſwer is no anſwer; and therefore ſhall not prevent a decree to take the bill *pro confeſſo*. *Turner* v. *Turner* 619

9. Bill amended after anſwer may be taken *pro confeſſo* generally, not as to the amendments only; the record being entire. *Bacon* v. *Griffiths.* 619

10. Bill by a legatee very nearly of age to ſecure the legacy: the coſts were given out of the eſtate: but that will not be done in future upon a bill to ſecure the legacy of an infant: as under the Legacy Act 36 *Geo.* 3. *c.* 51. *ſ.* 32. the executor may pay the legacy into Court, and the legatee, when of age, may petition for it. *Whopham* v. *Wingfield.* 630

11. This Court will not before a decree interpoſe in favour of an executor againſt a creditor proceeding at law. *Ruſh* v. *Higgs.* 638

12. A work alleged to be a piracy referred to the maſter. ——— v. *Leadbetter.* 681

13. A detainer, before the defendant could be diſcharged from an illegal arreſt, as where he was returning from his examination under a Commiſſion of Bankruptcy againſt him, cannot be ſupported. *Ex parte Hawkins.* 691

14. Bidding opened on advance of 50 *l.* on 380 *l.* paying the expence. 10 *l.* *per cent.* not ſufficient on a ſmall ſum. *Upton* v. *Lord Ferrers.* 700

15. Outlawry is at this day the common proceſs in *Ireland.* 738

16. Plaintiff pays the coſts upon a bill of diſcovery. *Page* 742

17. Upon a queſtion as to the amount of a legacy from a doubt as to a figure, an iſſue was directed inſtead of a reference to the maſter. *Norman* v. *Morrell.* 769

SEE *Ejectment* 1. *Juriſdiction* 1. *Lunatic* 2. *Ne exeat Regno* 1. *Pauper.* *Pleading* 4.

Preſumption.

SEE *Will* 61, 62.

Principal and Agent.

1. Account between principal and agent ſettled from looſe papers; the agent having kept no regular books. After his death liberty was given to ſurcharge and falſify upon allegation of errors ſince diſcovered. *Lord Hardwicke* v. *Vernon.* 411

2. Agent employed to ſell eſtates took them for himſelf under colour of a fictitious purchaſe; and ſold part: after his death an inquiry was directed to aſcertain the real value; according to which his eſtate was to be charged; the principal having an option to take what remained unſold; and the agent having fraudulently prevailed on his principal to execute a leaſe under the real value, the agent's eſtate was charged with the loſs ariſing from that. *Lord Hardwicke* v. *Vernon.* 411

SEE *Executor* 8. 11. *Fraud* 1. *Principal and Surety* 1.

Principal and Surety.

1. A ſurety to the *Eaſt India* Company diſcharged by payment of a balance to the principal under an erroneous ſettlement by the Officers of the Company without their authority or knowledge. *Law* v. *The Eaſt India Company.* 824

2. The *Eaſt India* Company having compelled payment from a ſurety in *India* by their power over him, as one of their ſervants, without an account or proceeding againſt the principal, (tho' ſolvent) and otherwiſe under harſh circumſtances, he was reſtored to the ſame ſituation by a decree for repayment with intereſt at 5 *per cent.* upon giving ſecurity for repayment, in caſe in a future ſuit by the Company he ſhould be held liable. The Court would not upon the circumſtances give *Indian* intereſt. *Law* v. *The Eaſt India Company.* *Page* 824

SEE *Bankrupt* 8, 9.

Priority.

SEE *Bankrupt* 11.

Privilege.

SEE *Practice* 13.

Proceſs.

SEE *Pleading* 4. *Practice* 15.

Promiſſory Note.

SEE *Condition* 2.

Proteſtant Diſſenters.

SEE *Charity* 4.

Public Office.

SEE *Office.*

Purchaſe (Words of.)

1. A deed is conſtrued more ſtrictly than a will according to the legal import of the words. Therefore in a marriage ſettlement after life eſtates to the huſband and wife a remainder to the heir male of her body by him to be begotten, and to his heirs, and, for want of ſuch iſſue, to the daughters, and if there ſhould be no iſſue of the marriage, to the right heirs of the huſband, was held a contingent remainder in fee in ſuch perſon as ſhould be heir male of the wife at her death. *Bayley* v. *Morris.* 788

2. Under a limitation by deed to the father for life, remainder to his iſſue male, remainder to the father in fee, the ſons took by purchaſe as joint-tenants for life only; the word "iſſue" in a deed being a word of purchaſe. 794

SEE *Limitation.* *Will* 28.

Purchaſer.

1 Purchaſer juſtified in taking a fair objection, tho' over-ruled. *Cox* v. *Chamberlain.* 631

2. *Qu.* Whether a purchaſer under a power to revoke uſes, ſubſtituting other eſtates of equal value, is not bound to ſhew the value of the ſubſtituted eſtates. *Page* 638

SEE *Truſt* 6.

Whether bound to look to application of purchase money. 99.

Pyracy.

SEE *Practice* 12.

R

Receiver.

SEE *Executor* 9.

Redemption.

SEE *Aſſets* 1. *Copyhold* 3. *Lacheſs* 1, 2.

Regiſtry Act.

SEE *Mortgage* 4.

Remainder Man.

SEE *Copyhold* 7. *Renewal.*

Remote Limitation.

SEE *Executory Deviſe. Perpetuity.*

Renewal.

1. Bill by deviſee in remainder to him and his heirs male of a leaſe for lives againſt tenant for life, alſo entitled in reverſion to him and his heirs, to compel him to procure a renewal, one life having dropped: the conſtruction of the will being, that the leaſe ſhould be kept full, and that 500*l.* and no more ſhould be charged thereon for that purpoſe upon the dropping of each life, decreed, that if the plaintiff choſe to pay the exceſs, the leaſe ſhould be renewed; in truſt to ſecure the 500*l.* and, ſubject thereto, for the defendant for life; after his deceaſe, to raiſe the farther ſum advanced by the plaintiff for renewal and the expence of the ſuit, with compound intereſt at 4 *per cent.* during the life of defendant, and ſubject thereto for plaintiff in tail male; remainder to defendant in fee: the defendant was not allowed to charge the eſtate with 500*l.* towards a fine paid by him upon a former renewal without conſent of the remainder-man. *White* v. *White.* *Page* 24
2. Tenant for life of an eſtate for lives being himſelf one of the lives, it is not competent to the remainder-man to compel him to contribute to the expence of renewal, if it is a legal eſtate. *Q.* If a truſt. 33
3. The rule, that tenant for life of an eſtate for lives ſhall pay one-third of the expence of renewal, was unreaſonable, and does not now prevail: the fair proportion is, that he ſhall keep down the intereſt, like the deviſee of a mortgaged eſtate. 33

Repreſentative.

A right of retainer is not prejudiced by the circumſtance, that the adminiſtration is granted to another for the uſe of the creditor, a lunatic, any more than if *durante minoritate*, nor, that the debt is due to a truſtee. *Franks* v. *Cooper.* 763

SEE *Executor. Fraud* 1. *Truſt* 4.

Reſidue.

SEE *Intereſt* 1. *Legacy* 11. *Truſt* 1, 2. 5. 9. 14, 15, 16, 17, 18. *Will* 56. 58, 59.

Reſtriction.

SEE *Conſtruction.*

Reſulting Truſt.

SEE *Truſt* 1, 2. 5. 9. 14, 15, 16, 17, 18.

Retainer.

SEE *Repreſentative.*

Reverſionary Term.

SEE *Portion.*

Review (Commiſſion of).

SEE *Will* 15. 19.

Revocation.

SEE *Power* 4. *Purchaſer* 2. *Will* 12. 48, 49. 61, 62.

Royal Family Privateers.

SEE *Lacheſs* 3.

S

Satisfaction.

1. Legacy at 21, the intereſt for maintenance, not ſatisfied by advancements during minority for the infant's benefit, nor by a legacy larger, but of a different nature, received under the will of the executor: there being no poſitive relinquiſhment; tho' no demand for ten years. *Lee* v. *Brown.* *Page* 362
2. Settlement previous to marriage of the wife's fortune on herſelf, with a covenant by the huſband in conſideration of the marriage, *&c.* and for making ſome proviſion for the wife and her iſſue, to pay within three months after his death 6000 *l.* to the truſtees, in truſt if the wife ſhould ſurvive him, and there ſhould be no iſſue, (which was the event) to pay 1500 *l.* to the wife, her executors, *&c.* and to pay the intereſt of the remaining 4500 *l.* to her for life. She is entitled to dower: and her ſhare under the Statute of Diſtributions is not a ſatisfaction or performance of the covenant. *Couch* v. *Stratton.* 391
3. As to a preſumed ſatisfaction of a debt by a legacy there is no diſtinction between the caſes of parent and child and of ſtrangers: therefore circumſtances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the application of the rule of ſatisfaction. *Tolſon* v. *Collins.* 483
4. Portion by will *primâ facie* a ſatisfaction of a portion by ſettlement. 491

SEE *Will* 46.

Scotland.

SEE *Perpetuity* 3.

Separate Commiſſion.

SEE *Bankrupt.*

Separate Creditor.

SEE *Bankrupt.* *Creditor.*

Sequeſtration.

SEE *Pleading* 4.

Settlement.

SEE *Contract* 2. *Infant en Ventre* 3. *Satisfaction* 4.

Ship-owner.

SEE *Bankrupt* 4.

Solicitor.

SEE *Attorney.*

Specific Deviſe or Bequeſt.

SEE *Executor* 3. 5. 9. *Legacy.* *Will.* 8. 44. 52.

Specific Performance.

SEE *Contract.*

Statute of Frauds.

SEE *Frauds.*

Stock.

1. Transfer of Stock by way of loan upon bond, with condition to replace the ſtock ſix months after the date, and in the mean time to pay intereſt at 5 *per cent.* The Stock not being replaced, and being depreciated, the obligee is entitled to the value of the Stock at the time of the transfer with intereſt at 5 *per cent.* to the date of the Report; credit being given for ſome payments on account of the principal. *Forreſt* v. *Elwes.* 492
2. In an action recently after breach of an agreement to transfer Stock, the riſe, if any, would be given in damages. 497
3. The 3 *per cents.* are perpetual annuities granted for ever, redeemable by the public. The common expreſſion therefore of "100*l.* Stock," *&c.* is incorrect. 751
4. The 5 *per cent.* annuities of 1797 created upon the ſubſcription of the Bank for the public ſervice, and in purſuance of a reſolution of the Bank divided among the proprietors of the Bank Stock *pro ratâ*, are conſidered as an accretion to the capital; and therefore a perſon entitled for life can have the benefit of it by way of dividend only. *Brander* v. *Brander.* 800

SEE *Truſt* 11.

Subpoena.

SEE *Practice* 1, 2.

Subſtitution of Eſtates.

SEE *Power* 4. *Purchaſer* 2.

Surety.

SEE *Bankrupt* 8. *Principal and Surety.*

Surplus.

SEE *Reſidue.*

Survivorſhip.

SEE *Baron and Feme* 1. *Will* 43.

T

Tail.

SEE *Eſtate Tail.*

Tenant.

SEE *Copyhold.*

Tenant for Life.

SEE *Copyhold* 7. *Renewal.* *Will* 11.

Tenant in Common.

No action of trover between tenants in common. *Page* 760

SEE *Will* 43.

Tender.

SEE *Mortgage* 4.

Term Reverſionary.

SEE *Portion* 1.

Timber.

SEE *Copyhold* 5. 7.

Title Deeds.

1. An heir at law has no equity except to remove incumbrances in the way of his legal right: he cannot call for an inſpection of deeds in the poſſeſſion of the deviſees. *Lady Shafteſbury* v. *Arrowſmith.* 66
2. Bill by heir in tail againſt deviſees: on motion an inſpection was ordered of all deeds of ſettlement, admitted to be in the poſſeſſion of the defendants, creating eſtates in tail general; but no farther. *Lady Shafteſbury* v. *Arrowſmith.* 66

Transfer.

SEE *Stock.*

Trial.

SEE *New Trial.*

Trover.

SEE *Tenant in Common* 1.

Truſt and Truſtee.

1. The executor being by a legacy for his care clearly a truſtee of the reſidue for the next of kin, the other muſt be a truſtee alſo. *White* v. *Evans.* *Page* 21
2. Where it appears by expreſs declaration or plain inference, that executors are not intended to take the reſidue beneficially, they are truſtees. A legacy is only one mode of ſhewing it; and if expreſſed to be for care and trouble, parol evidence cannot be received. 22
3. A general deviſee in truſt for the teſtator's widow and children having received from the widow, who was executrix, on her going abroad to recover part of the property, bonds for a debt from him and his partners to the eſtate, in ſettling the affairs of the partnerſhip on the retirement of one partner, who had notice of the truſt, delivered to him the bonds to be cancelled without the privity of the *Ceſtuys que truſt*; continuing to make remittances on that account from the funds of the new partnerſhip: the partner, who retired, is not diſcharged. *Dickenſon* v. *Lockyer.* 36
4. The Court will not interfere between repreſentatives by changing the nature of property in execution of a truſt, the object of which has failed. *Croft* v. *Slee.* 60
5. Executor having ſpecific bequeſts by will and codicil held a truſtee for the next of kin as to the reſidue undiſpoſed of. *Holford* v. *Wood.* 76
6. One truſtee for the ſale of an eſtate having releaſed and conveyed to his co-truſtee refuſed to join in the receipt of the purchaſe money: upon the ſpecial expreſſion of the deed the purchaſer was not held to the agreement with the remaining truſtee; it would have been otherwiſe, if one had merely renounced. *Crewe* v. *Dicken.* 97

S

Satisfaction.

1. Legacy at 21, the intereſt for maintenance, not ſatisfied by advancements during minority for the infant's benefit, nor by a legacy larger, but of a different nature, received under the will of the executor: there being no poſitive relinquiſhment; tho' no demand for ten years. *Lee* v. *Brown.* *Page* 362

2. Settlement previous to marriage of the wife's fortune on herſelf, with a covenant by the huſband in conſideration of the marriage, *&c.* and for making ſome proviſion for the wife and her iſſue, to pay within three months after his death 6000 *l.* to the truſtees, in truſt if the wife ſhould ſurvive him, and there ſhould be no iſſue, (which was the event) to pay 1500 *l.* to the wife, her executors, *&c.* and to pay the intereſt of the remaining 4500 *l.* to her for life. She is entitled to dower: and her ſhare under the Statute of Diſtributions is not a ſatisfaction or performance of the covenant. *Couch* v. *Stratton.* 391

3. As to a preſumed ſatisfaction of a debt by a legacy there is no diſtinction between the caſes of parent and child and of ſtrangers: therefore circumſtances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the application of the rule of ſatisfaction. *Tolſon* v. *Collins.* 483

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Ship-owner.

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Specific Deviſe or Bequeſt.

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Specific Performance.

SEE *Contract.*

Statute of Frauds.

SEE *Frauds.*

Stock.

1. Transfer of Stock by way of loan upon bond, with condition to replace the ſtock ſix months after the date, and in the mean time to pay intereſt at 5 *per cent.* The Stock not being replaced, and being depreciated, the obligee is entitled to the value of the Stock at the time of the transfer with intereſt at 5 *per cent.* to the date of the Report; credit being given for ſome payments on account of the principal. *Forreſt* v. *Elwes.* 492

2. In an action recently after breach of an agreement to transfer Stock, the riſe, if any, would be given in damages. 497

3. The 3 *per cents.* are perpetual annuities granted for ever, redeemable by the public. The common expreſſion therefore of "100*l.* Stock," *&c.* is incorrect. 751

4. The 5 *per cent.* annuities of 1797 created upon the ſubſcription of the Bank for the public ſervice, and in purſuance of a reſolution of the Bank divided among the proprietors of the Bank Stock *pro ratâ*, are conſidered as an accretion to the capital; and therefore a perſon entitled for life can have the benefit of it by way of dividend only. *Brander* v. *Brander.* 800

SEE *Truſt* 11.

Subpoena.

Subpoena.

SEE *Practice* 1, 2.

Subſtitution of Eſtates.

SEE *Power* 4. *Purchaſer* 2.

Surety.

SEE *Bankrupt* 8. *Principal and Surety.*

Surplus.

SEE *Reſidue.*

Survivorſhip.

SEE *Baron and Feme* 1. *Will* 43.

T

Tail.

SEE *Eſtate Tail.*

Tenant.

SEE *Copyhold.*

Tenant for Life.

SEE *Copyhold* 7. *Renewal.* *Will* 11.

Tenant in Common.

No action of trover between tenants in common. *Page* 760

SEE *Will* 43.

Tender.

SEE *Mortgage* 4.

Term Reverſionary.

SEE *Portion* 1.

Timber.

SEE *Copyhold* 5. 7.

Title Deeds.

1. An heir at law has no equity except to remove incumbrances in the way of his legal right: he cannot call for an inſpection of deeds in the poſſeſſion of the deviſees. *Lady Shafteſbury* v. *Arrowſmith.* 66
2. Bill by heir in tail againſt deviſees: on motion an inſpection was ordered of all deeds of ſettlement, admitted to be in the poſſeſſion of the defendants, creating eſtates in tail general; but no farther. *Lady Shafteſbury* v. *Arrowſmith.* 66

Tranſfer.

SEE *Stock.*

Trial.

SEE *New Trial.*

Trover.

SEE *Tenant in Common* 1.

Truſt and Truſtee.

1. The executor being by a legacy for *his* care clearly a truſtee of the reſidue for the next of kin, the other muſt be a truſtee alſo. *White* v. *Evans.* *Page* 21
2. Where it appears by expreſs declaration or plain inference, that executors are not intended to take the reſidue beneficially, they are truſtees. A legacy is only one mode of ſhewing it; and if expreſſed to be for care and trouble, parol evidence cannot be received. 22
3. A general deviſee in truſt for the teſtator's widow and children having received from the widow, who was executrix, on her going abroad to recover part of the property, bonds for a debt from him and his partners to the eſtate, in ſettling the affairs of the partnerſhip on the retirement of one partner, who had notice of the truſt, delivered to him the bonds to be cancelled without the privity of the *Ceſtuys que truſt*; continuing to make remittances on that account from the funds of the new partnerſhip: the partner, who retired, is not diſcharged. *Dickenſon* v. *Lockyer.* 36
4. The Court will not interfere between repreſentatives by changing the nature of property in execution of a truſt, the object of which has failed. *Croft* v. *Slee.* 60
5. Executor having ſpecific bequeſts by will and codicil held a truſtee for the next of kin as to the reſidue undiſpoſed of. *Holford* v. *Wood.* 76
6. One truſtee for the ſale of an eſtate having releaſed and conveyed to his co-truſtee refuſed to join in the receipt of the purchaſe money: upon the ſpecial expreſſion of the deed the purchaſer was not held to the agreement with the remaining truſtee: it would have been otherwiſe, if one had merely renounced. *Crewe* v. *Dicken.* 97

7. Truſtee charged with intereſt. *Younge* v. *Combe*. *Page* 101

8. Truſtee for the purchaſe of land died without perſonal aſſets, but having purchaſed land: the eſtates were held not liable to the truſt; the circumſtances affording no preſumption, that they were purchaſed in execution of the truſt. *Perry* v. *Phelips*. 108

9. Teſtatrix by will appointed an executor, and gave him a legacy: afterwards by a teſtamentary paper ſhe directed the reſidue to be diſpoſed of according to private inſtructions to him; and having by a ſubſequent codicil added another executor died without giving any inſtructions: the executors are truſtees of the reſidue for the next of kin. *Mordaunt* v. *Huſſey*. 117

10. Settlement upon marriage of ſtock, the property of the wife, in truſt from time to time to receive the dividends, and pay them into the hands of the wife for her ſole and ſeparate uſe, her receipt to be a diſcharge; after her deceaſe, if the huſband ſhould ſurvive, for him for life; and after the deceaſe of the ſurvivor, to transfer the principal among the children according to her appointment by will; in default thereof, equally; if no children, according to her appointment by will. The truſtees with the privity of the wife ſold the ſtock, and paid the money to the huſband, taking his bond of indemnity: he died inſolvent. Upon the bill of the widow and children the fund being replaced by the truſtees was transferred to the Accountant General upon the truſts of the ſettlement; the truſtees to pay the dividends to the widow from the death of the huſband, with coſts. *Whiſtler* v. *Newman*. 129

11. Truſtee of ſtock ſells it: the *Ceſtuy que truſt* has an option to have the ſtock or the produce with intereſt. 497

12. Legacy to a father the better to enable him to provide for his younger children: he conſented to ſecure the capital; but was held entitled to the intereſt. *Brown* v. *Caſamajor*. 498

13. Decree diſcharging from a truſt a woman, who had married a foreigner; though the anſwer denied an intention of quitting the kingdom; and ſtated her deſire of continuing in the truſt. *Lake* v. *De Lambert*. *Page* 592

14. A partnerſhip in *London* being appointed, not individually, but as a firm, executors and guardians claimed the reſidue undiſpoſed of in excluſion of perſons appointed attorneys, executors and guardians, in *Denmark*, and others appointed attorneys and executors in *India*: decreed a truſt for the next of kin; and it was referred to the Maſter to appoint a guardian. *De Mazar* v. *Pybus*. 644

15. Bequeſt of various particulars, compriſing all the teſtator's perſonal eſtate, to his wife for life: then, after ſpecifically diſpoſing of and charging with legacies certain parts after the death of his wife, he appointed her executrix, ſhe paying his debts and funeral expences: held a reſulting truſt as to the reſidue; there being no farther diſpoſition and no evidence. *Dicks* v. *Lambert*. 725

16. Executor takes the reſidue undiſpoſed of, unleſs there is a ſtrong and violent preſumption againſt him. A legacy does afford that preſumption, unleſs there are ſpecial circumſtances. 729

17. Ground of admitting parol evidence between the executor and next of kin as to the reſidue undiſpoſed of. 730

18. Bequeſt to executor by way of exception is not ſufficient to bar him from the reſidue undiſpoſed of. 731

SEE *Executor* 10. 12, 13. *Fraud* 1. *Lunatic* 1.

Truſt of Term.

SEE *Perpetuity*.

Turnpike Securities.

SEE *Charity* 5. *Will* 42.

Uſury.

SEE *Intereſt* 3.

V

Veſted Intereſt.

1. Reſiduary bequeſt to truſtees upon truſt to pay the dividends, &c, equally between the teſtator's two great-nieces until their reſpective marriages, and from and immediately after their reſpective marriages to aſſign and transfer their reſpective moieties or ſhares thereof unto them reſpectively, held a veſted intereſt before marriage; being taken out of the general rule from the Civil Law, that *dies incertus in teſtamento conditionem facit.* One of the legatees being dead without having been married, the the Court directed one moiety to be paid to her executors; but would not permit the other moiety to be paid, but directed the intereſt and dividends of that moiety to be paid to the other legatee, with liberty to apply in caſe of her marriage or her death before marriage. *Booth* v. *Booth.* *Page* 399

2. Where an abſolute property is given by will, and a particular intereſt is given in the mean time, it is not a condition precedent, but a deſcription of the time, when poſſeſſion is to be taken. 409

3. Bequeſt of the reſidue to *A.* for life; and after her death legacies were given to *B.* or to her proper repreſentative, in caſe ſhe ſhould not be living at the deceaſe of *A.*, and to four other perſons or their repreſentatives or repreſentative: one of the four died in the life of the teſtator; and another ſurvived him, but died in the life of *A.*; the former lapſed; the latter veſted. *Corbyn* v. *French.* 418

4. Conſtruction as to veſting, in what children, and when; and as to the ſubject, upon which the ſettlement was intended to attach. *Luders* v. *Anſtey.* 501

5. Legacy to the teſtator's wife of the dividends of ſtock for her life; which, he directs, ſhall be continued in the ſame ſtock, and then to be ſhared equally ſhare and ſhare alike to his children that ſhall be then living: he alſo gave to his wife a leaſehold houſe (of which fifty years were unexpired) for her life, and then to be let during the time of the leaſe to come, and the neat produce thereof to be equally placed in the ſtocks for the benefit of his children that ſhall be then living equally: and as to the reſidue of his eſtate whatſoever and whereſoever the product he gave, &c, the ſame to be collected yearly to his wife and children equally ſhare and ſhare alike that are then living. In other diſpoſitions the words "*then*" and "*then living*" were uſed with reference to ſome period expreſſed, *viz.* the age of twenty-one, or the death of the perſon to take for life. The ſtock and houſe veſted at the wife's death in thoſe children, who ſurvived her: the reſidue veſted at the teſtator's death in his wife and all the children equally. *Reeves* v. *Brymer.* *Page* 692

6. Bequeſt of the dividends of ſtock to *A.* for her life; and then to remain in the ſame ſtock till each of her children attain twenty-one, and then to be paid their equal ſhare of the ſame; if any die before twenty-one, to go to the ſurvivors or ſurvivor; and not to be under any claim or juriſdiction of their father or any huſband *A.* may have. Of two children one died in the life of her mother, married, and above twenty-one. Transfer of a moiety to her adminiſtrator upon the mother's death eſtabliſhed: the other moiety veſted in the ſurviving daughter, an infant, ſo far as to entitle her to the dividends; and a reference was directed as to her father's ability. *Reeves* v. *Brymer.* 692

7. Teſtator bequeathed a leaſehold eſtate (after an eſtate for life) to his nephew *A.* and the heirs male of his body lawfully begotten, and in default of ſuch heirs to one of the ſons of his nephew of *B.* as *A.* ſhall direct by a conveyance in his life or by his laſt will. Another leaſehold eſtate he bequeathed to *A.* upon truſt, ſubject to certain charges, to employ the remainder of the rent to ſuch children of *B.* as *A.* ſhall think moſt deſerving, and that will make the beſt uſe of it, or to the children of his nephew *C.* if any ſuch there are or ſhall be. *A.* dying in the teſtator's life, the bequeſt of the latter eſtate was eſtabliſhed in favor of all the children: *Quære*, as to the former. *Brown* v. *Higgs.* 708

SEE *Condition* 1. *Legacy* 9. *Power* 2. 6. *Will* 13.

Voluntary Deed.

A. by a voluntary deed aſſigned all the perſonal eſtate which he was then or might at any time afterwards be poſſeſſed of or entitled to, upon truſt to pay the intereſt, *&c*, to himſelf for life, and after his deceaſe to ſuch perſons as he ſhould appoint by will for their lives, and ſubject there to, to pay the principal to his next of kin, who ſhould be living at his deceaſe, his, her, or their, executors, *&c.* Soon afterwards the teſtator by his will gave ſome legacies, and gave the reſidue to the perſons by name, who were his next of kin at the execution of the deed and at his death; upon whoſe bill claiming under the deed an account of the truſt eſtate received by the truſtees, and of the perſonal eſtate, *&c*, and to ſet aſide the legacies, it was held, that the power was not executed by the will, but one of the plaintiffs being clearly affected with notice and acquieſcence in the plan of giving the legacies inſtead of executing the power, the cauſe was ordered to ſtand over, with liberty to file a bill to eſtabliſh the legacies: the Court inclining, in caſe the other plaintiff could be affected with notice, at all events to apply the intereſt of the perſonal eſtate during the lives of the legatees in payment of the legacies. They were afterwards paid under a compromiſe. *Griffin* v. *Nanſon.* *Page* 344

W

Ward of Chancery.

SEE *Baron and Feme* 2. 9. *Truſt* 12.

Waſte.

SEE *Copyhold* 2. 4. 6. 7.

Weſt India Eſtate.

SEE *Conſignment.*

Wife.

SEE *Baron and Feme.*

Will.

1. Notwithſtanding declarations of the teſtator to his executor, that he never meant to call for payment of a promiſory note, it was held part of the aſſets; which were inſufficient for the legacies; a charge on the real eſtate failing for want of a proper atteſtation of the will. *Byrn* v. *Godfrey.* *Page* 6
2. Undertaking to do ſomething, if the will is not changed, is binding. 10
3. A will cannot be varied upon the ground of miſtake; unleſs the alleged miſtake is clearly inconſiſtent with the intention upon the whole will. *Melliſh* v. *Melliſh.* 45
4. Miſtake in a will corrected upon the clear intention appearing on the whole will. *Philips* v. *Chamberlaine.* 51
5. The capital of the reſidue paſſed by implication; 'tho' the intereſt and dividends only were expreſsly diſpoſed of. *Philips* v. *Chamberlaine.* 51
6. A miſtake in a will cannot be corrected, or an omiſſion ſupplied, unleſs it clearly appears by fair inference from the whole will. 57
7. A will reſtrained in point of extent to a partial diſpoſition by a particular enumeration and a reference to other inſtruments, notwithſtanding the general words "perſonal eſtate." *Holford* v. *Wood.* 76
8. Specific diſpoſition by will ſubject to annuities and legacies held auxiliary only; the general perſonal eſtate to be applied in the firſt inſtance. *Holford* v. *Wood.* 76
9. Two annuities of equal amount in the ſame will to the ſame perſon: held not accumulative. *Holford* v. *Wood.* 76
10. Teſtator deviſed real eſtate to A. in tail male; remainder over; and gave a ſum of money in truſt to be laid out in land, to be ſettled to the ſame uſes: by codicil he deviſed the ſame real eſtate to B. and his heirs; and gave every thing, he had given by his will to A. in as ample a manner to B: B. is tenant in fee of the real eſtate; and is entitled to have the money paid to him. *Younge* v. *Combe.* 101
11. The Lord Chancellor and the Maſter of the Rolls inclined to think, the legal eſtate in mortgaged premiſes paſſed by a general reſiduary (*a*) deviſe by the mortgagee to A, who was alſo executor, his heirs, executors, adminiſtrators, and aſſigns, for ever on the ſide of his mother. A. being 19, the Lord Chancellor would not order him to join in the conveyance under the ſtatute

7 *Anne*

(*a*) The contrary has been ſince held in *The Attorney General* v. *Buller*, before The Lord Chancellor in the Sittings after *Hilary Term* 22d *March* 1800.

7 *Anne*, *c.* 19 but ordered the money to be paid into the Bank *ex parte* the infant; and ſaid, when he ſhould come of age, it would be very reaſonable, that he ſhould join. *Ex parte Sergiſon.* *Page* 147

12. Mutual wills by two unmarried ſiſters under 21: the marriage of one does not revoke the will of the other. *Hinckley* v. *Simmons.* 160

13. Bequeſt to *A.* and in caſe of her death to *B.* held an abſolute intereſt in *A.* *Hinckley* v. *Simmons.* 160

14. Teſtator gave all the reſidue of his perſonal eſtate to his wife, except ſuch parts as ſhould be in and about his houſe; which parts he gave to his ſon; and directed the houſehold furniture to go as heir looms; and gave all arrears of rent, which ſhould be due to him at his death, to his ſon: a bond to ſecure an old arrear of rent, and caſh, both found in an iron cheſt, in which the Steward kept the caſh ariſing from the rents, belong to the reſiduary legatee. *Jones* v. *Lord Sefton.* 166

15. Commiſſion of Review granted upon a ſentence of the Court of Delegates affirming a ſentence of the Prerogative Court eſtabliſhing a will. *Matthews* v. *Warner.* 186

16. An unfiniſhed teſtamentary paper of no effect; the party having lived eight days afterwards. *Griffin* v. *Griffin.* 197

17. A letter to an attorney containing inſtructions for drawing a will eſtabliſhed as a will. *Habberfield* v. *Browning.* 200

18. A will, diſpoſing both of real and perſonal property, with a clauſe of atteſtation, but no witneſſes, eſtabliſhed as to the perſonal property. *Cobbold* v. *Baas.* 200

19. Commiſſion of review in *Ireland* upon a ſentence of the Court of Delegates, affirming a ſentence of the Prerogative Court. *Goodwin* v. *Goſtler.* 211

20. Deviſe of real eſtates of the annual value of near 5000*l.* and other eſtates directed to be purchaſed with the reſidue of the perſonal eſtate, amounting to above 600,000*l.* to truſtees and their heirs, &c. upon truſt during the lives of the teſtator's ſons *A. B.* and *C.* and of his grandſon *D.* and of ſuch other ſons as *A.* now has or may have and of ſuch iſſue as *D.* may have and of ſuch iſſue as any other ſons of *A.* may have and of ſuch ſons as *B.* and *C.* may have and of ſuch iſſue as ſuch ſons may have as ſhall be living at his deceaſe or born in due time afterwards and during the life of the ſurvivor to receive the rents and profits, and from time to time inveſt the ſame, and the produce of timber, &c. in other purchaſes of real eſtates; and, after the death of the ſurvivor of the ſaid ſeveral perſons, that the ſaid eſtates ſhall be divided into three lots, and that one lot ſhall be conveyed to the eldeſt male lineal deſcendant then living of *A.* in tail male; remainder to the ſecond, &c. and all and every other male lineal deſcendant or deſcendants then living, who ſhall be incapable of taking as heir in tail male of any of the perſons, to whom a prior eſtate is limited, of *A.* ſucceſſively in tail male; remainder in equal moieties to the eldeſt and every other male lineal deſcendant or diſcendants then living of *B.* and *C.* as tenants in common in tail male in the ſame manner, with croſs remainders; or if but one ſuch male lineal deſcendant, to him in tail male; remainder to the truſtees, their heirs, &c. The other two lots were directed to be conveyed to the male deſcendants of *B.* and *C.* reſpectively in the ſame manner, and with ſimilar limitations to the male deſcendants of their brothers, and to the truſtees in fee; and it was directed, that the truſtees ſhould ſtand ſeiſed upon the failure of male lineal deſcendants of *A. B.* and *C.* as aforeſaid upon truſt to ſell and pay the produce to his Majeſty, his heirs and ſucceſſors, to the uſe of the Sinking Fund; the accumulation, till the purchaſes or ſales can take place, to go to the ſame purpoſe; with a direction, that all the perſons becoming entitled ſhall uſe the ſirname of the teſtator only. The truſts of the will were eſtabliſhed. *Thelluſſon* v. *Woodford.* 227

21. The intention of the teſtator if clear and conſiſtent with the rules of Law, is to govern, without regard to the grammatical conſtruction, or whether it deſerves favor, or not. 311

22. In

22. In ſome caſes, as for creditors, an intention will be inferred from the purpoſe, beyond what is expreſſed. *Page* 311

23. If words are capable of a two-fold conſtruction, the rule is to adopt ſuch as tends to make it good even in the caſe of a deed, much more of a will. 312

24. The purpoſe of accumulation no objection to an executory deviſe. 317. 320. 338.

25. The rule as to executory deviſe allowing any number of lives in being, a reaſonable time for geſtation, and twenty-one years is now the clear law. 319

26. Slight circumſtances are ſufficient to qualify and reſtrain general words in a will. 325

27. The intention of the teſtator is not to be ſet aſide, becauſe it cannot take effect to the full extent, but is to work as far as it can. 325

28. "*Heir male*" in a will may be words of purchaſe. 326.

29. The number of contingencies for an executory deviſe not material, if they are to happen within the limits allowed by Law. 327

30. Reaſons for allowing the ten months and twenty-one years after lives in being to poſtpone the veſting of an executory deviſe. 327

31. Executory deviſes not to be governed by the rules of Law as to common Law conveyances: but the queſtion is, whether they are to happen within a reaſonable time, or not. 328

32. A will is not to be affected on account of the unmeritorious object. 329

33. Only one general rule of conſtruction for Courts of Law and Equity applicable to all Wills; however the Court may condemn the object: the intention is to be collected from the whole will; every word is to have effect according to the natural, common, import: words of art to be conſtrued according to the technical ſenſe, unleſs upon the whole will, plainly not ſo intended. The Court are bound to carry the will into effect, if conſiſtent with the rules of Law; and if they can ſee a general intention conſiſtent with the rules of Law, but the particular mode is not, though that ſhall fail, the general intention ſhall take effect. *Page* 329

34. Every executory deviſe is good, that does not tend to a perpetuity: *i. e.* that does not tend to make an eſtate unalienable beyond the period allowed by Law as to legal eſtates. 331

35. Since the Revolution Judges have diſapproved of extending executory deviſe: but there is no inſtance of a limitation of the number of lives. 332

36. Reaſon for allowing the twenty-one years after lives in being for executory deviſe. 337

37. The amount of the property, the piety or prudence of the diſpoſition, afford no fair ground for controlling a will. 340

38. Where the whole property is deviſed, with a particular intereſt given out of it, it operates by way of exception out of the abſolute property. 408

39. To prevent a lapſe the intention muſt be perfectly clear. 435

40. Grandchildren entitled under the deſcription of "children" in a will; the intention upon the whole clauſe being children, or the iſſue of thoſe who ſhould be dead. *Royle* v. *Hamilton*. 437

41. Bequeſt for the improvement of the city of *Bath* conſtrued to mean improvements carrying on under an Act of Parliament, not by private perſons. *Howſe* v. *Chapman*. 542

42. Specific diſpoſition by will in truſt to ſell and in the firſt place pay debts, legacies, and charges of probate and execution of the truſt, and in the next place, that the reſidue of the money be appropriated to the improvement of the city of *Bath*, is void by *Statute* 9 *Geo*. 2. *c*. 36, as to a navigation ſhare, which being real eſtate goes to the heir, and as to money on real ſecurities, as mortgages, turnpike bonds, and Commiſſioners' bonds for the improvement of the city of *Bath*; which go to the next of kin: the general reſidue undiſpoſed of, was firſt applied to the debts and other charges; and

and the deficiency was born by the truſt property, that paſſed to the city of *Bath*, and that, of which the diſpoſition failed by the *Statute*, *pro ratâ*, *Howſe* v. *Chapman*. *Page* 542

43. Words of ſurvivorſhip in a will ſhall not defeat the effect of words importing a tenancy in common; but ſhall be referred to ſome time, as the death of the tenant for life; or even to the death of the teſtator, though a conſtruction not to be adopted, if there can be any other. *Ruſſel* v. *Long*. 551

44. Indorſement upon a note "I give this "note to *A*." may be proved as teſtamentary. 565

45. Favor or disfavor to the intention is not a ground for conſtruing a will. 574

46. The Maſter of the Rolls was of opinion, that upon the bequeſt of a debt there is no diſtinction between a voluntary and compulſory payment to the teſtator as to the queſtion of ademption. 574

47. Teſtator gave to his wife the third part of all his property, that ſhould become due to him after his deceaſe: then after giving ſome legacies he gave all the reſidue of his eſtate in general words, ſubject to the payment of all his debts, funeral expences, and legacies, upon truſt to collect the ſame reſiduary eſtate and pay the ſame to certain perſons. The wife is entitled to a third of the perſonal eſtate, ſubject to the debts, but not to the legacies. *Reed* v. *Addington*. 575

48. All codicils are part of the will. Therefore a codicil merely for a particular purpoſe, as to change an executor, and confirming the will in all other reſpects, does not revive a part of the will revoked by a former codicil. *Croſbie* v. *Macdoual*. 610

49. Two inconſiſtent wills: a codicil referring to the firſt by date as the laſt will cancels the intermediate will; and evidence of miſtake cannot be admitted. 616

50. *Voluntas teſtatoris ambulatoria eſt uſque ad mortem*. 210

51. Teſtator by a will unatteſted, after, among others, charitable legacies, to be diſtributed by his executor or executors, gave the remainder and reſidue of his eſtate, if any, and effects of what nature ſoever and whereſoever, which he ſhould be ſeiſed on, poſſeſſed of, &c, "next of kin or heir at law whom "I appoint my executor" after debts, &c, paid. He left one brother, and by deceaſed brothers a niece and ſeveral nephews, one of whom was heir at law. Diſtribution decreed according to the *Statute*. *Lowndes* v. *Stone*. *Page* 649

52. Legacy of 2400*l.* in the 5 *per cent.* Conſolidated Bank Annuities: decreed, that 2400*l.* 5 *per cent.* Annuities, *viz.* Navy bills, ſhould be purchaſed; evidence of the intention and miſtake as to the fund being rejected. *Chambers* v. *Minchin*. 675

53. Legacy to Price, the ſon of Price: upon the evidence the plaintiff, the only claimant, was declared entitled. *Price* v. *Page*. 680

54. Grandchildren may take under the deſcription of children, if there can be no other conſtruction, not otherwiſe. *Reeves* v. *Brymer*. 692

55. Every word of a will muſt have a meaning imputed to it, if capable of it without a violation of the general intent or any other proviſion in the will. 698

56. General reſiduary clauſe paſſes all, that is not ſufficiently diſpoſed of, as in caſe of lapſe. *Brown* v. *Higgs*. 708

57. Stock included in a will under the word "*ſecurities*"; legacies being charged, for which the ſecurities properly ſo called were not ſufficient. *Dicks* v. *Lambert*. 725

58. Teſtator gave certain leaſehold houſes in truſt for *A.* abſolutely for her ſeparate uſe, and other leaſehold houſes in truſt for *B.* for her ſeparate uſe for life; and after her deceaſe for her children; if none, to fall into the reſidue; and he gave the reſidue in truſt for *A.* and *B.* to be divided between them ſhare and ſhare alike, and to be paid and applied in like manner for their uſe and benefit as the rents and profits of the leaſehold premiſes herein before ſettled upon them; and their receipts to be a ſufficient diſcharge. The reference in the reſiduary clauſe is, not to the intereſts of *A.* and *B.* in the houſes, but to the proviſion, that they ſhall take for their ſeparate uſe; therefore they take the reſidue abſolutely. *Shonley* v. *Baker*. 732

59. A leaſehold houſe, the bequeſt of which, being to a charity fails, paſſes under a general diſpoſition of the reſidue, and does not belong to the next of kin as undiſpoſed of. *Shanley* v. *Baker.* *Page* 732

60. Under a reſiduary diſpoſition to the teſtator's right heirs on the part of his mother his ſiſter and nephew by a deceaſed ſiſter are entitled againſt remoter relations, claiming on the ground of an expreſs proviſion by an annuity for the ſeparate uſe of the ſiſter. *Forſter* v. *Sierra.* 766

61. If an eſtate is deviſed, charged with legacies, which fail, the deviſee, and not the heir, ſhall have the benefit of it. 811

62. Whether by the birth of more children ſubſequent to the date of the will, and, after the death of the teſtator's wife, his ſecond marriage, but no children by that, the will is revoked, *Quære.* *Gibbons* v. *Caunt.* *Page* 840

63. A ſubſequent marriage and the birth of a child revoke a will. *Quære* as to the propriety of admitting evidence againſt the preſumption. 848

SEE *Aſſets.* *Charity.* *Condition* 1. *Contract* 5. *Diſtribution.* *Executor.* *Fraudulent Deviſes.* *Intereſt.* *Legacy.* *Limitation.* *Perpetuity.* *Power* 1. *Purchaſe.* *Satisfaction* 4. *Veſted Intereſt* 1, 2, 3. 5; 6. *Voluntary Deed.*

THE END OF THE FOURTH VOLUME.

MVSEVM BRITANNICVM

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